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No. (1)

In The

# Supreme Court of the United States

HOWARD MILLER,

*Petitioner,*

v.

COMMODITY FUTURES TRADING COMMISSION,

*Respondent.*

**On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit**

## PETITION FOR WRIT OF CERTIORARI

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## QUESTIONS PRESENTED

1. Whether the respondent Agency's civil monetary penalty assessment complies with 7 U.S.C. § 9a;

2. Whether the respondent Agency abused its discretion when it assessed a civil monetary penalty;

3. Whether the respondent Agency sanctions which include a revocation of his commodity license, a permanent lifetime trading ban and a $350,000 civil monetary penalty violates the U.S. Constitution's Eighth Amendment as being unduly excessive, cruel and unusual, arbitrary and capricious and an abuse of discretion and/or in violation of the U.S. Constitution's Eighth Amendment;

4. Whether the respondent Agency's $350,000 civil monetary penalty, which includes the assessment of a penalty for "inflation" violates the U.S. Constitution's Eighth Amendment as being unduly excessive, cruel and unusual, arbitrary and capricious and an abuse of discretion and/or in violation of the U.S. Constitution's Eighth Amendment, when the respondent Agency was the cause of the delay.

5. Whether the Agency met the requirements of the Ninth Circuit's directives on Remand as set forth in December 20, 1999 Opinion (hereinafter referred to as "Ninth Circuit's 1999 Opinion").[1]

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[1] *Miller v. Commodity Futures Trading Commission*, 197 F.3d 1227 (9th Cir. 1999).

**QUESTIONS PRESENTED** – Continued

6. Whether the 9th Circuit's decision erred in not reversing the respondent Agency's arbitrary finding that petitioner waived his statutory right to have his net worth considered in the assessment of a civil monetary penalty arbitrary and capricious and an abuse of discretion and/or in violation of the U.S. Constitution's Eighth Amendment;

7. Whether the respondent Agency's error is of the nature to justify an exception to the policy of deference.

## PARTIES TO THE PROCEEDINGS

Petitioner is Howard Miller.

Respondent is the Commodity Futures Trading Commission.

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## OPINIONS BELOW

1. 9TH CIRCUIT MEMORANDUM (MARCH 22, 2006), IS UNREPORTED, DOCKET NUMBER 04-73914, IS REPRODUCED IN THE APPENDIX AT APP.3;

2. RESPONDENT AGENCY OPINION AND ORDER (JULY 23, 2004) IS UNREPORTED, DOCKET NUMBER 92-4, IS REPRODUCED IN THE APPENDIX AT APP.8;

3. 9TH CIRCUIT OPINION (DECEMBER 20, 1999) IS REPORTED AS MILLER v. COMMODITIES FUTURES TRADING COMM'N, 197 F.3D 1227 (9TH CIR. 1999), IS REPRODUCED IN THE APPENDIX AT APP.39;

4. RESPONDENT AGENCY OPINION AND ORDER (MARCH 12, 1998) IS REPORTED AS IN RE MILLER [1996-1998 TRANSFER BINDER] COMM. FUT. L. REP. (CCH) ¶ 27,297, (CFTC MARCH 12, 1998), IS REPRODUCED IN THE APPENDIX AT APP.58;

5. INITIAL DECISION (JUNE 21, 1996) IS REPORTED AS IN RE MILLER [1994-1996 TRANSFER BINDER] COMM. FUT. L. REP. (CCH) ¶ 26,722, (CFTC JUNE 21, 1996), IS REPRODUCED IN THE APPENDIX AT APP.80;

6. RESPONDENT AGENCY OPINION AND ORDER (JUNE 16, 1995) IS REPORTED AS IN RE MILLER [1994-1996 TRANSFER BINDER] COMM. FUT. L. REP. (CCH) ¶ 26,440, (CFTC JUNE 16, 1995), IS REPRODUCED IN THE APPENDIX AT APP.88.

7. INITIAL DECISION (MAY 25, 1994) IS REPORTED AS IN RE MILLER [1992-1994 TRANSFER BINDER] COMM. FUT. L. REP. (CCH) ¶ 26,084, (CFTC MAY 25, 1994), IS REPRODUCED IN THE APPENDIX AT APP.103.

## JURISDICTION

The Court of Appeals judgment was entered on March 22, 2006. A timely petition for rehearing was denied on June 1, 2006. Appendix at App. 115. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. The Eighth Amendment to the United States Constitution provides that: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

2. 7 U.S.C. § 9a requires that net worth be considered before the assessment of a civil monetary penalty.

3. The assessment of an enhanced civil monetary penalty due to the passage of time from the conduct complained of and the final assessment of a civil monetary penalty violates the Eighth Amendment of the Constitution.

## STATEMENT

Petitioner seeks review of the ruling of the Ninth Circuit Court of Appeals which held that the respondent Agency's assessment of a civil monetary penalty in the amount of $350,000 in addition to respondent Agency's assessment of career ending sanctions effective 10 years prior, was not arbitrary, capricious and an abuse of discretion.

Petitioner seeks review of the Ninth Circuit's ruling because it is in conflict with the rulings of this Court in *United States v. Bajakjian*, 524 U.S. 321 (1998), and others, and the Eighth Amendment of the United States Constitution. It is also in conflict with the rulings of other circuits and respondent Agency precedent.

This action was commenced on November 19, 1991, when the Division of Enforcement ("Enforcement") caused the filing of an administrative Complaint against petitioner, alleging petitioner's violation of the Commodity Exchange Act ("CEA"), between January 1978 and April 1989.[2] The conduct complained of was performed during a period of time that he was employed by The Siegel Trading Company ("Siegel").[3]

Following service of the Complaint on or about December 2, 1991, and the filing of petitioner's Answer on December 13, 1991, an Oral Hearing was held in this action on November 3, 4 and 23, 1993. As a result of the oral hearing, and others, penalty assessments were effected which violate the constitutional safeguards of the Eighth Amendment of the United States Constitution.

Petitioner submits that his petition for writ of certiorari is necessary as the Panel's 2006 Decision reflects an error of law and/or a misunderstanding of issue or fact in

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[2] Mr. Miller had been in the commodities industry as a Commission registrant for more than 20 years, and had not been associated with Siegel's sales practices for over 8 years prior to the ALJ's decision. (App. 104)

[3] Siegel Trading Group was closed following an action by respondent Agency alleging its continual violation of the Commodity Exchange Act. Respondent Agency fined Siegel a mere fraction of that it assesses against petitioner.

its affirmation of respondent Agency's assessment of civil penalties which are unduly excessive, arbitrary and capricious and an abuse of discretion and/or are assessed in violation of the U.S. Constitution's Eight Amendment and in noncompliance with the Ninth Circuit's directives on Remand as set forth in December 20, 1999 Opinion (hereinafter referred to as "the Panel's 1999 Opinion").[4]

For the foregoing and following reasons, petitioner submits that the United States Supreme Court should grant this petition for writ of certiorari to prevent the continuing injustice and further violation of the Eighth Amendment of the United States Constitution, prohibiting the imposition of excessive fines and the infliction of cruel and unusual punishment.

## REASONS FOR GRANTING THE PETITION

### A. Procedural History

Following service of the Complaint on or about December 2, 1991, and the filing of petitioner's Answer on December 13, 1991, an Oral Hearing was held in this action on November 3, 4 and 23, 1993.

#### 1. The ALJ's Initial Decision

On May 25, 1994, following the Oral Hearing and post-hearing briefing, the ALJ filed an Initial Decision finding that during periods complained of by respondent agency, petitioner had violated section 4c(b), 7 U.S.C.

[4] *Miller v. Commodity Futures Trading Commission*, 197 F.3d 1227 (9th Cir. 1999).

§ 6c(b) of the CEA and Commission Regulation 33.10, 17 C.F.R. § 33.10.[5]

### 2. First Appeal To The Respondent Agency[6]

On Appeal to the respondent Agency, it affirmed the ALJ's finding of petitioner's violation of the CEA and the assessment of the non-monetary sanctions, but vacated the ALJ's assessment of the civil monetary penalty against petitioner, remanding the same to the ALJ for a hearing to determine an appropriate civil monetary penalty, if any, consistent with Commission precedent.[7] Then-Commissioner Shapiro, formally Commissioner of the Securities and Exchange Commission and currently vice chairperson and president of the Regulatory Policy and Oversight Division of the National Association of Securities Dealers, filed a dissent to the permanent lifetime trading ban. Commissioner

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[5] The ALJ Ordered: 1) that petitioner cease and desist from violating 7 U.S.C. § 6c(b) of the CEA and Commission Regulation 33.10; 2) that petitioner's registration as an associated person be revoked, thereby rendering petitioner unemployable in the industry in which he had worked during the preceding twenty (20) years; 3) that petitioner be banned from trading on or subject to the rules of any contract market, and that all contract markets refuse him trading privileges, prohibiting him from trading his own account; and, 4) that petitioner pay a civil monetary penalty of $200,000. (App. 113-114)

[6] Following the May 25, 1994 Initial Decision, all parties appealed, *inter alia*, the ALJ's assessment of the monetary penalty against petitioner.

[7] The respondent Agency directed the following: "On remand, the ALJ shall calculate the civil monetary penalty he imposes in a manner consistent with *Gordon's* clarification of the starting point for the assessment of a civil monetary penalty. [footnote 5 . . . In *Gordon*, we held that absent a specific finding that such an approach was impractical or inappropriate, the starting point for the judge's analysis should be either the financial benefit that accrued to respondent or the losses suffered by his customers as a result of his wrongdoing.]" (App. 94)

Shapiro opined "As the Commission has previously stated [a] trading prohibition is a remedial sanction imposed to protect the futures markets from conduct which inherently threatens their ordering operation. A permanent prohibition is not in order if such a sanction is intended to punish a respondent for violations which, although grave, have no effect on the integrity of the futures market. *Incomco*, at 38,357 [footnote in *Monieson*, heavily relied upon by the Commission, the court expressed concern that the length of the two year trading prohibition in that case terming it 'a harsh penalty' (though of course preferable to the ALJ's lifetime prohibition) . . . *Monieson*, 996 F.2d at 863."

### 3. Hearing On Remand

On January 25 and 26, 1996, the ALJ held hearings concerning the appropriateness of an assessment of a civil monetary penalty.[8]

### 4. Second Appeal To The Commission

Petitioner appealed this civil monetary penalty contending that the $50,000 civil monetary penalty would deplete its net worth and remained excessive and was inconsistent with the respondent Agency's precedent.

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[8] The result of the hearings held was set forth in the 1996 Initial Decision wherein the ALJ, after a careful analysis of the testimony and "numerous financial documents" produced at hearing, and Commission precedent, concluded that petitioner had a net worth of approximately fifty thousand dollars ($50,000). As a result of the mandate on remand, the ALJ reevaluated the appropriateness of his previous penalty assessment and reduced his civil monetary penalty to fifty thousand dollars ($50,000).

Respondent Agency did not appeal the ALJ's findings and penalty assessment, therefore the only issue on Appeal to the respondent Agency was whether the ALJ abused its discretion by assessing a civil monetary penalty in an amount equal to what he determined to be petitioner's net worth. Despite the sole issue presented on appeal, on March 12, 1998, the respondent Agency filed its 1998 Opinion and Order which represented a significant, unreasonable and unconstitutional departure from the ALJ's assessment and what had been its own precedent. Respondent Agency's 1998 Opinion And Order failed to apply a reasoned analysis of its findings.[9]

### 5. The Ninth Circuit Court Of Appeal's 1999 Opinion

Following respondent Agency's 1998 Opinion And Order, and as a result of the foregoing, petitioner filed a Petition For Review with the Ninth Circuit Court of Appeals.

On review, the Ninth Circuit Court of Appeals, *inter alia*, found that the civil monetary penalty imposed by the respondent Agency had no basis in the record and was therefore an abuse of discretion by the respondent Agency.

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[9] Instead, the respondent Agency compounded the ALJ's error by vacating the ALJ's independent analysis and assessment of a $50,000 civil monetary penalty and replaced it with its own unsupportable and excessive imposition of a penalty of $600,000, erroneously concluding that, despite the ALJ's findings to the contrary, petitioner had waived his statutory right to have his net worth considered in the assessment of a civil monetary penalty.

The Ninth Circuit Panel remanded the action to the respondent Agency for reconsideration of the monetary penalty.[10]

In error, the Ninth Circuit Panel declined to disrupt the respondent Agency's erroneous and arbitrary finding that petitioner waived his statutory right to have his net worth considered in the assessment of a civil monetary penalty.

### 6. The Respondent Agency's July 23, 2004 Opinion And Order

Following the Ninth Circuit Panel's 1999 Decision remanding the action to the respondent Agency, respondent Agency waited almost five years before filing its Opinion and Order, filed July 23, 2004. Despite receiving a clear and straight- forward mandate from the Panel's 1999 Decision, almost five years later respondent Agency filed a split July 23, 2004 Opinion And Order, assessing an excessive and unconstitutional civil monetary penalty against petitioner in the amount of $350,000.[11]

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[10] In remanding the action to respondent Agency, the Panel found that, "The case has taken just eight years to reach this court, creating some doubt as to the deterrent effect of the Commission's efforts." (App. 40)

[11] The July 23, 2004 Opinion And Order assesses an additional civil monetary penalty of at least $150,000 claiming it as "inflation" for the period between the ALJ's 1994 Initial Decision and its 2004 Opinion and Order. This additional assessment highlights the continuing arbitrary and capricious nature of the civil monetary penalty against petitioner and its violation of the Eighth Amendment to the U.S. Constitution.

### 7. The Petition For Review of Respondent Agency's July 23, 2004 Opinion And Order

On review, petitioner argued that the 2004 Opinion And Order failed to address the concerns raised by the 1999 Panel's Decision, it failed to meet the requirements of the 1999 Panel's Decision; and it continued to violate the Eighth Amendment by assessing a civil monetary penalty which reflects its assertion of arbitrary power. The respondent Agency continued its failure to apply an act of reason grounded on the record before it.

### 8. The Split 2006 Panel Decision

Following the Panel's review of petitioner's petition for review, the Panel split in its decision with Justices Noonan and Hawkins affirming the respondent Agency's 2004 Opinion and Order and Justice Reinhardt dissenting, stating, *inter alia*, "I cannot agree with the majority's conclusion that the Commission's latest attempt to calculate a civil monetary penalty in this case is 'an act of reason grounded on the record before the agency.' "[12]

## B. The Record Does Not Support Respondent Agency's Penalty Assessment Against Petitioner

As the core of the respondent Agency's case against petitioner, Division called seven (7) customer witnesses in its attempt to establish that petitioner made guarantees of

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[12] Justice Reinhardt found further that " . . . the $350,000 penalty is clearly excessive and inconsistent with the Commission's own precedent." (App. 5)

profit to several customers.[13] The respondent Agency's Division admitted that prior to its contacting former customers of Siegel, it had received no complaints from any of petitioner's customers.[14] The Division also admitted that a number of petitioner's customers made money.[15] Additionally, respondent Agency witness Robert Benedetto testified that it was a general rule at Siegel, petitioner's employer at the time of the disputed facts, that in the option order process, all orders were pre-verified before the order was entered with the customer. (CR 116, TR-1, 59)[16]

The gravamen of respondent Agency's case, and its assessment of the variety of career-ending penalties and civil monetary penalty against petitioner, is its contention

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[13] According to the respondent Agency's Ex. No. 11, (CR 118), while an employee of Siegel, between January 1, 1984, and July 31, 1989, petitioner serviced 347 customers. Additionally, Ms. Tena Friery, a Division employee witness testified, and the ALJ agreed, that during the time period of her review, petitioner out-performed the other brokers at Siegel. (App. 5)

[14] Additionally, respondent Agency's Division admitted that petitioner was the only account executive to be prosecuted by the Division for alleged conduct in connection with Siegel (CR 118, R.Ex. 11 at ¶ 41), despite the fact that at times relevant to the Complaint, there were Siegel account executives with more customer complaints against them than petitioner. (R.Ex. 10 at ¶ 32)

[15] It is important to note that neither customer witness brought a legal action or claim against petitioner as a result of the purchases in their Siegel account, and only customer witness John Scully ever complained about his account and he received the return of his money.

[16] The ALJ found that there was no dispute that each customer witness was contacted both before and after the purchase of each option position in an effort to make sure that the customer understood the nature and cost of their respective purchase and to make sure that there had been no promises made regarding the profitability of the purchased option contract. (CR 121, TR-1, 255, 256, 257, 258)

that petitioner failed to disclose the risk of loss to seven customers out of the 347 customers he serviced while employed by Siegel Trading Company. Respondent Agency also claims that petitioner guaranteed profits to these seven customers, leading to their financial loss. Notwithstanding the respondent Agency's contentions, the record of the proceedings reveals otherwise. Indeed, a fair and reasonable review of the testimony of the seven customer witnesses evidences that each customer knew the risk of loss prior to purchasing commodity options through petitioner. See Scully Testimony (App. 131-136), Black Testimony (App. 171-173), Barnes Testimony (App. 141-151), Mezey Testimony, Timmons Testimony (App. 152), Cowan Testimony, and Weaver Testimony (App. 137-141) Mr. Weaver had previously traded with Siegel, petitioner's former employer, where he had lost money. Weaver made numerous transactions through Siegel between October 7, 1985 and February 10, 1989. Mr. Weaver did not meet petitioner until May of 1988, and he had already made trades through Siegel, petitioner's employer between October 1985 and November 1988, to a loss.[17]

Mr. Weaver admitted that he was advised about the risk of trading option contracts prior to his purchase but stated that "I thought that was a standard disclaimer that was required of any company . . . it was like a "hazard to your health" on a pack of cigarettes. (CR 116, TR-1, 70, 71)[18]

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[17] Mr. Weaver's testimony was untruthful and unreliable as he wrongfully denied the fact that he had a trading account with Siegel prior to meeting petitioner. (App. 139-140)

[18] Mr. Weaver explained his faulty memory regarding his testimony was caused by stress that was going on in his life stating "There's been a lot of water under the bridge since then." (App. 137-141)

The testimony of the customer witnesses listed above is respondent Agency's sole basis for its determination that petitioner's conduct amounted to CEA violations, justifying a license revocation, a lifetime trading ban, and an excessive civil monetary penalty.[19]

When the Appellate Court afforded the respondent Agency the opportunity to reassess its assessment of penalties by redetermining the monetary penalty appropriate to the gravity of petitioner's offenses, after waiting almost five (5) years to do so, the respondent Agency failed in its task and again, assessed a monetary penalty which was arbitrary, excessive and capricious, inconsistent with 7 U.S.C. § 9a, and violative of the Eighth Amendment to the U.S. Constitution's prohibition against excessive fines and the infliction of cruel and unusual punishment.[20]

Petitioner submits that the record fails to establish conduct by petitioner which would justify, career-ending sanctions and an excessive civil monetary penalty.

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[19] The fact that petitioner out-performed the other brokers at Siegel supports the Ninth Circuit Court of Appeals' finding, "In the trading of options on commodities futures, as all agree, there are substantial risks. There are always losers. To attribute all customer losses to the fraud of the broker goes in the face of this fact. Similarly, to attribute all of Miller's income to fraud assumes that he never put a customer in the way of a profit and that never in four years of trading gave one piece of honest advice. The assumption is arbitrary." Ninth Circuit's 1999 Opinion at 1236.

[20] A review of the record in total evidences that the respondent Agency committed prejudicial and reversible error in its assessment of the civil monetary penalty against petitioner. The respondent Agency erred and abused its discretion in vacating the ALJ's penalty assessment of $50,000 and replacing such an assessment with its own penalty of $600,000, reduced to $350,000 on remand.

As a result of the Ninth Circuit Panel's insufficient review of respondent Agency's insufficient analysis and/or consideration of the facts and issues relating to its assessment of a civil monetary penalty, the appropriateness of the combination of sanctions utilized more than 20 years after the violative conduct, the application of the Court's policy of deference is inappropriate, and the respondent Agency's civil monetary assessment should be vacated. *See, Lyles v. United States*, 759 F.2d 941, 944 (D.C. Cir. 1985).[21]

The respondent Agency has addressed penalty assessment at length in note 2 *In the Matter of Grossfeld, et al.*, [1994-1996 Transfer Binder] (CCH) Comm. Fut. L. Rep. ¶25,975 at 41,116, which states in relevant part that:

> At the time the Complaint in this matter was issued, Section 6(d) of the Act required the Commission to consider in the assessment of civil penalties both the gravity of the respondent's violations and either (1) the appropriateness of the penalty to the size of the respondent's commodity futures business and the ability to continue in business or (2) the appropriateness of the penalty to the respondent's net worth.
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> * * *

[21] A review of the complete testimony of the customer witnesses reveals that petitioner's customers never believed that there was a guarantee that would vitiate the known risk of loss. As the ALJ noted, and confirmed by Ms. Slobin, Siegel's supervisor of trade verifications who testified pursuant to subpoena, each customer was again advised, and acknowledged prior to their purchase, that there were no guarantees given, that each understood the risks associated with the purchase of an option contract through Siegel and that they understood the commission and fee assessment. (App. 173-174)

*In the Matter of Rothlin*, [1982-1984 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶21,851, 27,573.

Here, the respondent Agency remanded the issue of the appropriateness of a civil monetary penalty assessment and directed that any civil monetary penalty to be assessed in this matter be calculated "in a manner consistent with *Gordon's* clarification of the starting point for the assessment of a civil money penalty.", i.e. the starting point for such an analysis "should be either the financial benefit that accrued to respondent (i.e. commissions) or the losses suffered by his customers as a result of his wrongdoing." Undoubtedly the losses contemplated by *Gordon* were the customer witnesses' net losses. See, *In the Matter of Gordon*, [1992-1994 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 25,667 at 40,182 (CFTC Mar. 16, 1993). See also, *In re Newman*, [1990-1992 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 25,356 at 39,192 (CFTC Aug. 6, 1992), wherein the respondent agency held that the appropriate guide to a civil money penalty that would deter future wrongdoing by the respondent in that case and other industry professionals tempted to undertake similar wrongdoing was the losses suffered by the five customers who testified against respondent. Here, petitioner has already been severely sanctioned with career-ending prohibitions.[22] Indeed, petitioner has been out of the commodities industry for more than 10 years. There is no

[22] Although the loss of a commodity futures registration and a lifetime trading ban are argued to be non-monetary sanctions, in reality such sanctions eliminate or severely compromise the ability to generate future income and employment thereby causing a negative monetary impact.

record of further wrongdoing by petitioner. Therefore, there is no need for further penalties.[23]

The Commodity Exchange Act does not require imposition of all or any of the possible sanctions for every violation. *In re Brody*, [1986-1987 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 23,081 at 32,181 (CFTC May 20, 1986). See, *In the Matter of Grossfeld*, [Current Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 25,726 (CFTC Feb. 9, 1994); *In the Matter of Gordon*, [1992-1994 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 25,667 (CFTC Mar. 16, 1993); *In the Matter of Siegel Trading Co.*, [1977-1980 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 20,452 (CFTC July 26, 1977); *In the Matter of Newman*, [1990-1992 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 25,356 (CFTC Aug. 6, 1992).

The sanctions to be utilized by the respondent agency are intended to be remedial rather than punitive in nature. See, Section 6(e) of the Commodity Exchange Act, 7 U.S.C. § 9a(1); See also, *In re Incomco*, [1990-1991 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 25,198 at 38,538 (CFTC Dec. 30, 1991); and, *In re Volume Investors Corp.* [1990-1992 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 25,234 at 38,679 (CFTC Feb. 10, 1992) where the Commission declined to impose civil monetary penalties in light of the other penalties assessed. There is no record of any subsequent misconduct by petitioner. As the Ninth Circuit Court of Appeals stated:

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[23] Petitioner is now over 75 years old. Petitioner was in failing health throughout the underlying litigation and his health has deteriorated. The conduct complained of by the respondent Agency was over 20 years ago and, even if true, does not warrant a further penalty.

> "In the background are the Eighth Amendment's prohibitions, although constitutional restraints are not at issue here. In the foreground, and determinative, is the law against any exercise of power by a federal agency that is an assertion of arbitrary power rather than an act of reason grounded on the record before the agency. See *Motor Vehicles Manufacturers Association of the Unites States, Inc. v. State Farm Mutual Automobile Insurance Co.*, 463 U.S. 29, 42-43 (1983)." Ninth Circuit's 1999 Opinion at 1236.

The July 23, 2004 Opinion And Order fails to correct the errors addressed by the Ninth Circuit's 1999 Opinion, and it must be vacated.

Here, petitioner was only an employee of Siegel Trading Company, he did not create and/or manage its sales program.[24] Most, if not all, of the comparative cases mentioned by respondent Agency to justify its monetary penalty, involve sanctions leveled against the owners of businesses found in violation of the Commodity Exchange Act. Additionally, in each case, the amount of customer losses were greater than the $100,000 found by the ALJ in this case.

Despite the Ninth Circuit Court of Appeals 1999 Opinion's caution to the respondent Agency that, "In the foreground, and determinative, is the law against any exercise power by a federal agency that is an assertion of

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[24] It has been conclusively decided by the ALJ that petitioner's net worth is approximately $50,000. Such a net worth is insufficient to pay the civil monetary penalty assessed by respondent Agency. See, *In re Murlas Commodities Inc.*, [1987-1990 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 24,440, at 35,930 (CFTC Apr. 24, 1989).

arbitrary power rather than an act of reason grounded on the record before the agency", the July 23, 2004 Opinion And Order fails to apply, "an act of reason grounded on the record." After explaining why the record was not developed enough to assess a civil monetary penalty based on commissions received by petitioner or his conduct towards other customers, respondent Agency merely concludes: "Inflation since 1995 has somewhat undermined the deterrent effect a $200,000 penalty would have on Miller . . . In view of these factors, and others established on the record, we believe that a civil monetary penalty of $350,000 is appropriate to the gravity of Miller's violations and necessary to our goal of deterrence." July 23, 2004 Opinion And Order, 14. The only explanation offered by the respondent Agency of its assessment of the $350,000 civil monetary penalty, was its assertion that "If we treat the deception of each customer as one violation, the maximum civil money penalty would be $700,000. Since this limit far exceeds the amount of the penalty we are imposing, we need not specifically determine whether the Complaint in this proceeding reasonably could be interpreted as alleging more than seven violations." July 23, 2004 Opinion And Order (App. 24)

When as here, the respondent Agency's findings turn on statutory interpretation of the limits of the agency's sanctions, the Court's review is not limited to the grounds considered by the agency. The Court should refuse to enforce respondent Agency's Opinion And Order as it fails to articulate rationally the basis for its conclusions or reasons for choosing one outcome over another. See, *Railroad Labor Executives Assn. v. ICC*, 784 F 2d 959, 968-970 (9th Cir. 1986).

The record before the Court fails to establish conduct by petitioner which would justify, career-ending sanctions

and an excessive $350,000 civil monetary penalty which includes an increase for "inflation", and it was error for the Panel not to reverse the assessment as suggested by Justice Reinhardt's dissent.[25]

Petitioner submits that as a result of respondent Agency's and the 9th Circuit's insufficient analysis and/or consideration of the facts and issues relating to its assessment of a civil monetary penalty, the appropriateness of the combination of sanctions utilized more than 18 years after the allegedly violative conduct, the application of the Court's policy of deference is inappropriate, and the respondent Agency's civil monetary assessment should have been vacated. See, *Lyles v. United States*, 759 F.2d 941, 944 (D.C. Cir. 1985).

Petitioner submits that the July 23, 2004 Opinion And Order fails to correct the errors addressed by the Ninth Circuit's 1999 Opinion, and it must be vacated.[26]

Notwithstanding the fact that the sanctions to be utilized by the respondent Agency are intended to be remedial rather than punitive in nature, and despite the fact that the ALJ followed its mandate on remand, the sanctions assessed against petitioner were clearly intended to be more

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[25] The respondent Agency erred and abused its discretion in vacating the ALJ's penalty assessment of $50,000 and replacing such an assessment with its own penalty of $600,000, now reduced to $350,000 on remand.

[26] As stated in Justice Reinhardt's dissent, "the history of this case demonstrates the extent to which the Commission's approach has not been a product of 'an act of reason grounded on the record', as mandated by the 1999 Panel Decision. During the course of the proceedings spanning over ten years, the penalty amount has gone from $200,000, to $50,000, to $600,000, and is now $350,000. The Commission's path is not one 'that may reasonably be discerned.'"

than remedial, but punitive as well. See, Section 6(e) of the Commodity Exchange Act, 7 U.S.C. § 9a(1); See also, *In re Incomco*, [1990-1991 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 25,198 at 38,538 (CFTC Dec. 30, 1991); and, *In re Volume Investors Corp.* [1990-1992 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 25,234 at 38,679 (CFTC Feb. 10, 1992) where the Commission declined to impose civil monetary penalties in light of the other penalties assessed.[27]

The July 23, 2004 Opinion And Order fails to apply "an act of reason grounded on the record".[28]

The Ninth Circuit Panel erred by not reversing Respondent Agency's Civil monetary penalty assessment of $350,000 as Justice Reinhardt recognized that such a penalty is "clearly excessive and inconsistent with the Commission's own precedent." (App. 5)

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[27] In dissent to the majority's affirmation of the excessive penalty, Justice Reinhardt found that "the $350,000 penalty is clearly excessive and inconsistent with the Commission's own precedent." See Dissent at 1. (App. 5)

[28] Indeed, Justice Reinhardt's dissent addresses this very point and concludes " . . . , the history of this case demonstrates the extent to which the Commission's approach has not been 'an act of reason grounded in the record.'" Dissent to 2006 Panel Decision, at 3. (App. 7)

## CONCLUSION

For the foregoing reasons, and in the interest of justice, petitioner respectfully submits that a writ of certiorari should be granted.

Respectfully submitted,

Dated: August 30, 2006

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[LOGO]

Cathy A. Catterson
Clerk of Court

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Office of the Clerk
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June 9, 2006

Kirk T. Manhardt
COMMODITY FUTURES TRADING COMMISSION
1155 21st St., NW
Washington, DC 20581

| No. | Title | Agency/D.C. No. |
|---|---|---|
| 04-73914 | Miller v. CFTC | 92-04 |

Dear Clerk:

The following document in the above listed cause is being sent to you under cover of this letter.

- *Certified copy of the Decree of the Court*

The record on appeal will follow under separate cover. Please acknowledge receipt on the enclosed copy of this letter.

Very truly yours,
Cathy A. Catterson
Clerk of Court
/s/
By: Eliza Lau
Deputy Clerk

Enclosure(s)
cc: All Counsel

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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

| | |
|---|---|
| HOWARD MILLER,<br>Petitioner,<br>V.<br>COMMODITIES FUTURES TRADING COMMISSION,<br>Respondent. | No. 04-73914<br>CFTR No. 92-4<br>**JUDGMENT** |

Upon Petition to Review of an Order of the
Commodities Futures Trading Commission

This cause came on to be heard on the Transcript of the Record from the Commodities Futures Trading Commission and was duly submitted.

On consideration whereof, it is now here ordered and adjudged by this Court, that the decision of the Commodities Futures Trading Commission in this cause be, and hereby is **AFFIRMED**.

**Filed and entered Wednesday, March 22, 2006**

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172 Fed. Appx. 183

**NOT FOR PUBLICATION**

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

| | |
|---|---|
| HOWARD MILLER,<br>Petitioner,<br>v.<br>COMMODITIES [sic] FUTURES TRADING COMMISSION,<br>Respondent. | No. 04-73914<br>CFTC No. 92-4<br>MEMORANDUM*<br>(Filed Mar. 22, 2006) |

On Petition for Review of an Order of the
Commodity Futures Trading Commission

Argued and Submitted March 13, 2006
San Francisco, California

Before: REINHARDT, NOONAN, and HAWKINS, Circuit Judges.

Howard Miller petitions for review of an order of the Commodity Futures Trading Commission ("CFTC") imposing a $350,000 civil monetary penalty for fraudulent solicitation in violation of the Commodity Exchange Act. The penalty was imposed on remand. *See Miller v. CFTC*, 197 F.3d 1227 (9th Cir. 1999) ("*Miller I*").

* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 36-3.

The CFTC's choice of sanction is reviewed for abuse of discretion. *Lawrence v. CFTC,* 759 F.2d 767, 774 (9th Cir. 1985). Every exercise of power by a federal agency must constitute "an act of reason grounded on the record before the agency." *Miller I,* 197 F.3d at 1236. While the agency must articulate a "rational connection between the facts found and the choice made," *Burlington Truck Lines v. United States,* 371 U.S. 156, 168 (1962), courts "will uphold a decision of less than ideal clarity if the agency's path may reasonably be discerned." *Bowman Transp., Inc. v. Arkansas-Best Freight Sys., Inc.,* 419 U.S. 281, 286 (1984).

Here, the Commission's path may reasonably be discerned. The Commission first calculated the proved amount of loss to seven identified customers of Miller as a starting point for its analysis. The Commission then increased this amount in order to meet its goal of deterrence. *See Miller I,* 197 F.3d at 1236. It looked to the penalty it found necessary to deter similar conduct in a previous case. In *In re Gordon,* [1994-1996 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 26,326 (CFTC March 6, 1995) ("Gordon II"), the Commission imposed a $200,000 penalty after five customers testified to fraudulent solicitation over a period of 20 months.

The Commission then adjusted that amount to take into account the differences between the two cases and the effect of inflation on the deterrent effect of a given monetary penalty, finding that an increase was warranted because Miller's misconduct took place over a longer period, 50 months, and because inflation between 1995 and 2004 had "undermined the deterrent effect a $200,000 penalty would have on Miller."

The final amount of the penalty – $350,000 – does not relate to customers' losses according to any set formula. However, the choice of civil monetary penalties is an exercise of discretion, not the ministerial application of a formula to the facts. *Cf. Miller I,* 197 F.3d at 1236. Because the Commission's path can reasonably be discerned from its decision and that path rationally relates the facts found to the ultimate penalty decision, the choice of a $350,000 civil monetary penalty was not an abuse of discretion.

Miller's remaining arguments are barred by the law of the case doctrine, since they were resolved in *Miller I.* AFFIRMED.

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*Miller v. CFTC*, No. 04-73914

REINHARDT, Circuit Judge, dissenting:

I cannot agree with the majority's conclusion that the Commission's latest attempt to calculate a civil monetary penalty in this case is "an act of reason grounded on the record before the agency." To the contrary, the $350,000 penalty is clearly excessive and inconsistent with the Commission's own precedent.

First, the Commission determined that the amount of loss suffered by the seven testifying customers was approximately $100,000. At oral argument, the government stated that the commissions Miller earned from those seven customers amounted to approximately half that amount, $50,000. The $350,000 penalty is therefore *seven times* the amount of Miller's apparent gains from the seven customers in question.

Moreover, in its 1998 Opinion and Order, the Commission concluded that the total commissions earned by Miller

from 1988 through 1991 totaled $637,519.[1] Accordingly, the $350,000 penalty amounts to approximately 55% of Miller's total earnings during the four-year period or almost 220% of his average annual income. By contrast, as the Commission's latest decision acknowledges, in several earlier cases it has imposed penalties amounting to a far smaller percentage of the income earned by the respondent. In one such case, the Commission imposed a $208,000 penalty on a respondent who earned at least $1.2 million during the period at issue in the Complaint – the penalty therefore amounted to 17% of his total earnings. *See In re Commodities International Corp.*, [1996-1998 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 26,943 (CFTC Jan. 14, 1997). In another case, the Commission imposed a $510,000 penalty where the respondent earned a salary of $1.4 million in just one of the years covered by the Complaint – the penalty was thus 36% of the respondent's earnings in that single year. *See In re JCC, Inc.*, [1992-1994 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 26,080 at 41,582 (CFTC May 12, 1994). Therefore, by the Commission's own precedent, Miller's penalty appears to be inappropriate and excessive.

Second, the majority cites the Commission's finding that it was necessary to impose a greater penalty than that in *In re Gordon*, [1994-1996 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 26,326 (CFTC March 6, 1995) ("Gordon II"), because inflation "undermined the deterrent

[1] No information was provided for the 1987 tax year but the period covered by the Complaint included only one third of 1991. Given the ordinary increase in income one experiences over time and the ordinary increases attributable to inflation, the Commission's income figure seems an appropriate one to use for the pertinent period.

effect a $200,000 penalty would have *on Miller*." (emphasis added). There is no need to deter Miller from committing future violations however, for the simple reason that he is no longer allowed to work in the commodities industry. The Administrative Law Judge's May 25, 1994 Initial Decision revoked Miller's commodity futures registration and imposed a lifetime trading ban. The excessive size of the penalty thus cannot be justified by the need to deter Miller from any future wrongdoing.

Finally, the history of this case demonstrates the extent to which the Commission's approach has not been "an act of reason grounded on the record." During the course of proceedings spanning over ten years, the penalty amount has gone from $200,000, to $50,000, to $600,000, and is now $350,000. The Commission's path is not one that "may reasonably be discerned." If we were to remand the case again, who knows what figure the Commission would settle upon.

In sum, the Commission's imposition of the $350,000 civil monetary penalty was an abuse of discretion. Miller is seventy-seven years old, has not worked in the commodities industry for over ten years, and the commissions he earned from the seven customers in question totaled only about $50,000. For the forgoing reasons, I would reverse the Commission's order. I respectfully dissent.

UNITED STATES OF AMERICA
Before the
COMMODITY FUTURES TRADING COMMISSION

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|---|---|
| In the matter of | CFTC Docket No. 92-4 |
| HOWARD MILLER | OPINION and ORDER |

In June 1995, the Commission found that between January 1987 and April 1991, respondent Howard Miller ("Miller") violated Section 4c(b) of the Commodity Exchange Act ("Act") and Commission Rule 33.10 by fraudulently inducing customers to open option accounts with his employer, Siegel Trading Company ("Siegel"). In particular, the Commission concluded that Miller misled customers about the fundamental nature of options trading by minimizing the risk of loss and informing them that they easily could double or triple their money within a short period of time. *In re Miller*, [1994-1996 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 26,440 at 42,912-14 (CFTC June 16, 1995) ("*Miller I*").

As for sanctions, the Commission held that the record supported the imposition of a cease and desist order, registration revocation, and permanent trading prohibition. *Miller I* at 42,914 n.9. Because the record had not been sufficiently developed to permit the imposition of a civil money penalty, the Commission remanded the case to the presiding Administrative Law Judge ("ALJ") for additional proceedings. *Id.* at 42,914.

In March 1998, the Commission was once more confronted with a limited record on issues material to the calculation of a civil money penalty. It noted that Miller bore responsibility for the limited record on factors material to

his net worth because his response to Division of Enforcement ("Division") subpoenas was substantially incomplete. In these circumstances, the Commission concluded that Miller waived his right to have net worth considered in determining an appropriate civil money penalty. *In re Miller,* [1996-1998 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 27,297 at 46,351 (CFTC Mar. 12, 1998) ("*Miller II*").

The Commission also reviewed the record for evidence material to determining the relative gravity of Miller's misconduct. It noted that antifraud prohibitions are at the core of the Act's regulatory purposes. Consequently, the Commission reasoned that Miller's misconduct would be properly characterized as "very grave" even if the record demonstrated some mitigating circumstances. *Id.* at 46,349.[1] In addition, the Commission noted that the record showed that Miller's misconduct was both intentional and repeated,[2] and included egregious practices such as guaranteeing profits and misrepresenting his experience and trading success. *Id.* at 46,350. The Commission also emphasized that, after his misconduct was discovered, Miller neither cooperated with the Division's investigation nor took steps to ameliorate the consequences of his wrongdoing. *Id.*

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[1] In this regard, the Commission noted that customer testimony that Miller relied on in mitigating his wrongdoing did not address his solicitation practices at Siegel during the period at issue in the Complaint. *Id.* at 46,350 n.12.

[2] For example, the Commission cited testimony indicating that Miller called customers repeatedly to encourage them to open Siegel accounts. *Id.* at 46,350.

Finally, the Commission addressed the financial consequences flowing from Miller's misconduct. In this regard, the Commission described the testimony of a Commission investigator who had analyzed trading records pertaining to Miller's customers at Siegel between January 1984 and July 1989. *Id.* at 46,346. In light of this testimony and related exhibits, the Commission found that Miller's customers lost $1,351,623 between January 1987 and July 1989. *Id.* at 46,350. In light of tax records submitted by Miller, the Commission also found that Siegel paid him $637,519.94 in commissions from 1988 through 1991. *Id.*[3]

The Commission recognized that the record included the testimony of only seven customers who opened accounts after listening to Miller's fraudulent solicitations. *Id.* at 46,345. Nevertheless, it believed that it was "appropriate" to find that Miller's misconduct led to a "substantial portion" of the losses suffered by all his customers during the period covered by the Complaint. *Id.* at 46,350 n.13. In this regard, it noted that Miller's fraudulent solicitation "appeared fairly standard and consistent with regard to each of the testifying customers and clearly played a significant role in convincing his customers to expose themselves to the risks of the commodities markets." *Id.* The Commission also found that Miller's misconduct was "widespread and continuous" and emphasized that there was "no basis to conclude that Miller acted

[3] The Commission acknowledged that it was relying on estimates to determine both the financial gain that Miller derived from his wrongdoing and the losses suffered by his customers. It characterized these estimates as "conservative" due to the absence of evidence relating to the full period covered by the Complaint. *Id.* at 46,350 n.13.

differently with the numerous other customers whom he solicited at Siegel." *Id.*

In light of the factors it found established on the record, the Commission ordered Miller to pay a $600,000 civil money penalty. *Id.* at 46,351.

Miller then filed a petition for review in the United States Court of Appeals for the Ninth Circuit. After a detailed review of the testimony offered by the Division's seven customer witnesses, the court found "no basis" for disturbing the findings and conclusions underlying the Commission's liability analysis,[4] or the imposition of a cease and desist order, registration revocation, and permanent trading prohibition. *Miller v. CFTC*, 197 F.3d 1227, 1235 (9th Cir. 1999) ("*Miller III*").

The court held that the Commission had erred as a matter of law, however, by assuming that Miller fraudulently solicited his other customers as he had the Division's seven customer witnesses and that this treatment caused their losses. *Id.* at 1235. In this regard, the court emphasized that the record did not establish that the Division's seven witnesses were representative of Miller's hundreds of customers during the period at issue. According to the court, by relying on assumptions rather than reliable evidence, the Commission had improperly "transferred the burden of proof to Miller so that he had to prove

[4] The court found specifically that the ALJ did not err by crediting the testimony of the Division's seven customer witnesses. *Miller v. CFTC*, 197 F.3d 1227, 1234-1235 (9th Cir. 1999).

he had not defrauded the other customers and that fraud by him had not caused them substantial loss." *Id.* at 1236.[5]

Having identified the Commission's error, the court remanded for further proceedings. It remarked that the Commission was "free to fashion a monetary penalty appropriate to the gravity of Miller's offenses and sufficient to act as a deterrent," but must arrive at such a penalty through "an act of reason grounded on the record before the agency." *Id.*[6]

## DISCUSSION

### I.

In view of the court's remarks, we have re-examined our approach to determining an appropriate civil money penalty under the Act's "$100,000 per violation" alternative.[7] The applicable statutory language imposes two

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[5] As to the necessary link between respondent's wrongdoing and either financial benefit or customer losses, the court observed that:

> In the trading of options on commodit[y] futures, as all agree, there are substantial risks. There are always losers. To attribute all customer losses to the fraud of the broker goes in the face of this fact. Similarly, to attribute all of Miller's income to fraud assumes that he never put a customer in the way of a profit and that never in four years of trading gave one piece of honest advice. The assumption is arbitrary.

*Id.*

[6] The court agreed that Miller waived his right to have net worth considered in determining an appropriate civil money penalty by offering a substantially incomplete response to the Division's subpoena. *Id.* at 1235.

[7] The current version of the Act authorizes the Commission to impose civil money penalties of not more than "$100,000 for each . . . violation" or "triple the monetary gain to [respondent] for each such

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constraints. We must ensure that the amount of the penalty does not exceed the number of proved violations times $100,000. We must also "consider" the appropriateness of the amount of the penalty to the "gravity" of the proved violations.[8]

Because Congress did not provide precise instructions on how the Commission should determine a violation's gravity or what consideration should be given to the degree of gravity once determined, the Commission has exercised discretion in the context of case-by-case determinations. For example, the Commission has consistently held that the penalty appropriate to the gravity of proven violations is not normally equated with the statutory maximum. *See, e.g., In re Incomco,* [1990-1992 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 25,198 at 38,535-36 (CFTC Dec. 30, 1991). The Commission has also eschewed any formulaic approach to determining the penalty appropriate to the gravity of proven violations. *In re Grossfeld,* [1996-1998 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 26,921 at 44,467 (CFTC Dec. 10, 1996), *affd, Grossfeld v. CFTC,* 137 F.3d 1300 (11th Cir. 1998). Rather, it has assessed gravity by examining the relationship of the violations to the regulatory purposes of the Act, respondents' state of mind, the scope and frequency of the wrongdoing,

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violation." Prior to 1992, however, the Act simply required that civil money penalties not exceed "$100,000 for each . . . violation." Because Miller's conduct took place prior to the 1992 amendments, we limit our discussion to the $100,000 per violation approach.

[8] The version of the Act applicable in this case would normally also require us to consider whether the amount of the penalty appropriate to the gravity of respondent's wrongdoing was also appropriate to Miller's net worth. As noted above, however, the court affirmed our conclusion that Miller waived his right to consideration of this statutory factor.

respondents' post-violation conduct, and the financial consequences flowing from respondents' wrongdoing.

While consideration of these factors has generally proved helpful in assessing the overall gravity of respondents' violations, the Commission's ultimate goal has been to assess a specific penalty appropriate to the determined level of gravity and suitable to deter future violations. For many years, the Commission used "comparable cases" as a tool for moving from a gravity determination to a specific penalty. When using this tool, the Commission looked for prior cases where the gravity of the proven violations was roughly comparable to the gravity of the violations committed by the respondent at issue, and used the specific penalty imposed in the prior case as a rough guide to the appropriate penalty in the case at issue. *See, e.g., In re JCC, Inc.*, [1992-1994 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 26,080 at 41,582 (CFTC May 12, 1994).

The Commission also used its analysis of the financial consequences flowing from respondents' wrongdoing as a tool for moving from a gravity determination to a specific penalty. *See, e.g., In re Gordon,* [1992-1994 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 25,667 at 40,182 (CFTC Mar. 16, 1993) ("*Gordon I*"). In 1992, we offered a simple, straightforward explanation for giving a prominent role to such an analysis:

> Civil monetary penalties cannot be calculated with precision. Even so, such penalties may be rationally devised in accordance with the purposes [of deterrence]. We begin with the proposition that potential violators will be discouraged from illegal conduct if they know that they are unlikely to profit from it. Thus, in any individual

> case, our focus turns initially to the gain realized by the particular wrongdoers from their conduct.

*In re GNP Commodities,* [1990-1992 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 25,360 at 39,222-23 (CFTC Aug. 11, 1992) (*"GNP"*)), *aff'd in part and modified, Monieson v. CFTC,* 996 F.2d 852 (7th Cir. 1993).

Over the years, however, experience proved that neither tool was consistently useful or easy to administer. Consequently, in 1996 the Commission held that it would no longer give significant weight to the specific penalties imposed in prior cases. In explaining this change in precedent, the Commission noted several flaws that affected the usefulness of the comparable case tool, including that: (1) cases are rarely truly comparable; (2) the level of civil money penalties imposed in cases decided prior to 1992 was frequently depressed due to respondents' limited net worth; and (3) over time, the deterrent effect of a particular penalty amount is undermined by inflation. *Grossfeld,* ¶ 26,921 at 44,468 & n.35.

Reliance on an analysis of the financial consequences flowing from respondents' wrongdoing was plagued by different shortcomings, particularly the parties' limited development of the record on factual issues material to the analysis. The Commission took a fairly pragmatic approach to this limitation. For example, in *JCC,* ¶ 26,080 at 41,582, the Commission specifically noted that the parties did not present evidence of either how many customers were harmed by the fraudulent scheme established on the record or the overall loss suffered by affected customers. Based on evidence that the controlling person of the corporate respondent earned a salary of over $1.4 million during one year of the multi-year period covered by the

Complaint, the Commission inferred that he "benefited handsomely from the commissions earned as a result of the fraudulent solicitation methods employed at [the company]." *Id.*

While the Commission gave significant weight to its analysis of financial consequences in cases issued after *GNP,* it did not disregard the other factors material to determining gravity. For example, in *In re Gordon,* [1994-1996 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 26,326 (CFTC March 6, 1995) ("*Gordon II*"), *aff'd, Gordon v. CFTC,* 86 F.3d 1169 (11th Cir. 1996) (Table), the Commission addressed general gravity, scienter, and aggravating circumstances, in addition to the financial consequences of the violations. Moreover, the results of Commission decisions suggest that the weight accorded the analysis of financial consequences varied with the precision of the underlying evidence. For example, as noted above, in *JCC,* ¶ 26,080 at 41,582, the record showed that the controlling person earned a salary of $1.4 million in one of the years covered by the Complaint. Nevertheless, the Commission affirmed the ALJ's imposition of a $510,000 civil money penalty on the controlling person.[9] *Id.* at 41,583.

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[9] This apparent anomaly – imposition of a civil money penalty less than a respondent's apparent gain – is not an infrequent result when the Commission applies the $100,000 per violation approach to calculating civil money penalties. *See, e.g., In re Ferragamo,* [1990-1992 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 24,982 (CFTC Jan. 14, 1991) (affirming an ALJ's imposition of a $100,000 civil money penalty against a respondent who earned $400,000 during the period covered by the Complaint); *In re Shelton,* [1990-1992 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 25,332 (CFTC July 14, 1992) (rejecting the Division's request for a $280,000 civil money penalty and affirming an ALJ's imposition of a $2,500 civil money penalty on a respondent who earned $120,000 during the period covered by the Complaint but had a net

(Continued on following page)

Similarly, the Commission has also declined to treat evidence of specific financial consequences as a necessary element of the Division's burden of proof in support of the imposition of a civil money penalty. For example, when the record was essentially bare of evidence material to an analysis of the wrongdoing's direct financial consequences, the Commission did not hesitate to impose civil money penalties based solely on more general factors. *See, e.g., In re Elliott,* [1996-1998 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 27,243 at 46,007-08 (CFTC Feb. 3, 1998), *aff'd, Elliott v. CFTC,* 202 F.3d 926 (7th Cir. 2000).

Despite its pragmatic approach to the analysis of financial consequences, the Commission did recognize that proof problems could be sufficiently substantial to undermine reliance on financial consequences as a basis for determining a specific penalty. For example, in *Grossfeld, supra,* the presiding ALJ imposed a $2.7 million civil money penalty on respondent Grossfeld based primarily on a finding that Grossfeld had gained $2 million as a result of his wrongdoing. On appeal, the Commission concluded there was insufficient probative evidence to permit a reliable estimate of the financial benefit flowing from Grossfeld's wrongdoing and held that the ALJ had improperly relied on a "chain of inferences" beginning with a representation about what an entirely different officer was paid. ¶ 26,921 at 44,470 and n.39. Similarly, the Commission found that the ALJ's estimate of the losses suffered by

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worth of $10,000); *In re Commodities International Corp.,* [1996-1998 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 26,943 (CFTC Jan. 14, 1997) (affirming an ALJ's imposition of a $208,000 civil money penalty on a respondent who earned at least $1.2 million during the period at issue in the Complaint).

Grossfeld's customers was fatally unreliable. *Id.* at n. 40. Based on more general factors established on the record and its own "very conservative estimate" of customer losses, the Commission concluded that a $1.8 million civil money penalty was appropriate to the gravity of Grossfeld's violations. *Id.* at 44,471.

The court's opinion in this case makes it clear that we have a duty to assess the reliability of the factual inferences underlying any analysis of financial consequences used in calculating civil money penalties. The burden of establishing the reliability of a financial consequences analysis lies with the Division, and cannot be shifted to respondent merely because it might result in greater decisional efficiency. As our *Grossfeld* decision illustrates, our precedent recognizes the importance of such a reliability check and the nature of the Division's burden. In this regard, compliance with the court's mandate requires a more diligent and careful application of our existing precedent rather than a fundamental change in that precedent.

The court's opinion also emphasizes our duty to ensure that the calculation of civil money penalties reflects "an act of reason grounded on the record." In this context, we have considered whether we may continue to use reliable estimates of the financial consequences flowing from respondents' wrongdoing or whether we are obliged to require more precise proof. Under our precedent, an analysis of financial consequences is an important factor among other, more general factors. The weight we accord such an analysis can and should be varied with the precision of the underlying evidence. In our view, estimates must pass a reliability check and be given only weight proportionate to the precision of the underlying evidence,

before they can play a role in a calculation process properly characterized as reflecting an "act of reason grounded on the record."

The court also expressed concern about the causal link between Miller's fraud and losses suffered by his customers. In this regard, the court emphasized that options trading is inherently risky and often results in losses and observed that: "[t]o attribute all customer losses to the fraud of the broker goes in the face of this fact." *Miller III*, 197 F.3d at 1236.

In our view, the nature of Miller's fraudulent solicitation explains the apparent anomaly underlying the court's concern. As noted above, Miller misled customers about the fundamental nature of options trading by minimizing the risk of loss and informing them that they easily could double or triple their money within a short period of time. When misrepresentations go more to the nature of the market than the nature of a particular instrument, it is generally reasonable to infer that customers would never have opened an account or entered the market had they been aware of the true relationship between risk and reward. Indeed, this is why a return of the complaining customer's total out-of-pocket loss is the most common result in successful Commission reparations cases alleging fraudulent inducement. *See, e.g., Knight v. First, Commercial Financial Group, Inc.*, [1996-1998 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 26,942 (CFTC Jan. 14, 1997).

Similarly, the court's focus on the possibility that Miller offered his customers good trading advice is misplaced in the context of the type of fraudulent inducement established on this record. Given the inherent risk of commodity trading, successful trading results are at least

as likely to be the product of good luck as of good advice. A broker who has tricked his customer into undertaking the significant inherent risk of commodity trading cannot legitimize commissions paid under false pretenses by trying his best to recommend successful trades rather than unsuccessful trades. Consequently, as a general matter, a broker's net income from trading in an account arising out of a fraudulent solicitation going to the fundamental nature of the underlying market is properly viewed as part of the ill-gotten gains flowing from the fraud. Commissions may not be viewed as ill-gotten gains, however, if the record lacks a reliable basis for identifying the class of accounts opened due to a respondent's fraudulent solicitation.

While our reassessment of prior precedent convinces us that our approach remains fundamentally sound, we have concluded that our 1996 abandonment of "comparable cases" as a tool for moving from a gravity determination to a specific penalty warrants revisiting. We believe that this tool must be used carefully, with due regard for the circumstances that may justify giving its guidance lesser weight. With these caveats, it may be employed usefully in ensuring that our civil money penalties reflect an "act of reason grounded on the record."

II.

With these principles to guide us, we turn to an assessment of the civil money penalty appropriate to respondent's proven violations. As we discussed in *Miller I*, antifraud prohibitions are at the core of the Act's regulatory purposes. Consequently, Miller's misconduct would be

properly characterized as "very grave" even if the record demonstrated some mitigating circumstances. The record shows that Miller's misconduct was both intentional and repeated, and included egregious practices such as guaranteeing profits and misrepresenting his experience and trading success. After his misconduct was discovered, Miller neither cooperated with the Division's investigation nor took steps to ameliorate the consequences of his wrongdoing.

As the court highlighted, only seven of Miller's hundreds of customers described his fraudulent solicitation. The time periods that these solicitations were given (July, October and December 1987; May and September 1988; June 1990 and January 1991) tend to negate an inference that Miller's misconduct was isolated in a manner suggesting inexperience or inadvertence. Indeed, the court's review of the testimony of the Division's customer witnesses indicates that both in July 1987 and January 1991 Miller was using a similar "triple your money" pitch to lure customers. *See Miller III,* 197 F.3d at 1229 (Barnes's testimony), 1231 (Scully's testimony).

As the court emphasized, however, there is an important distinction between a bare suspicion that Miller led most or all of his customers to believe that he could triple their money and a reliable basis for drawing such an inference. In this instance the Division failed to develop the record on circumstances that might support such an inference – a written script with the offending language or other evidence that Siegel had a policy of encouraging its account executives to use certain fraudulent pitches. *Compare TCC,* ¶ 26,080 at 41,576 (use of fraudulent scripts); *In re First National Trading Corp.,* [1992-1994 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 26,142 at

41,783 (CFTC July 20, 1994) (testimony that account executives were taught to use a "standard line" with prospective customers). Nor did the Division elicit an admission from Miller that he used a certain type of sales pitch all or most of the time. *Compare In re Staryk,* [1996-1998 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 27,206 at 45,811 (CFTC Dec. 18, 1997) (respondent acknowledged that during a typical initial solicitation, he mostly discussed seasonal moves in markets). Finally, as the court noted, the Division did not take any steps to show that the experiences of its seven customer witnesses were representative of the experiences of Miller's other customers.

Because we lack a sufficient basis for reliably estimating the number of customers exposed to Miller's wrongful solicitation, we must base our analysis of the financial consequences of Miller's wrongdoing on the limited amount of reliable evidence available to us. In essence, this limits our analysis of the financial consequences to the seven customers who testified for the Division. The record admittedly does not establish the precise loss each of the seven customers suffered as a result of Miller's fraud. Barnes, for example, testified that he lost "[a]bout $35,000," and Black testified that he lost "[a]round $12,000." TR1 at 96, 247.[10]

The record permits us to reliably estimate the loss suffered by the seven testifying customers, however, as in excess of $100,000. The record regarding the commissions that the seven customers paid to Miller is insufficient to permit a reliable estimate.

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[10] References to "TR1 at ___" are to pages of the transcripts of the first hearing held in this proceeding.

Finally, the $200,000 civil money penalty we imposed in *Gordon II*, ¶ 26,326 at 42,592, is pertinent to our analysis. Like this case, *Gordon II* involved an account executive's fraudulent solicitation of customers. The period at issue in that Complaint was 20 months and the Division presented only five customers who testified about Gordon's deceptive solicitation. Like the misconduct at issue here, Gordon's wrongdoing was "serious" and "wholly unmitigated." *Id.*

*Gordon II* did present a better record on the financial consequences of the wrongdoing. The Commission estimated customer losses at $1 million and Gordon's gain at $200,000 to $260,000. On the other hand, the Commission had to consider Gordon's limited net worth of $220,000 in assessing his civil money penalty. *Id.* This suggests that it would have imposed a higher civil money penalty based solely on its assessment of the gravity of Gordon's misconduct.

Inflation since 1995 has somewhat undermined the deterrent effect a $200,000 penalty would have on Miller.[11] Moreover, the time period at issue in the Complaint in this case (50 months) is substantially longer than the time period at issue in *Gordon II*. In view of these factors, and the others established on the record, we believe that a civil money penalty of $350,000 is appropriate to the gravity of Miller's violations and necessary to our goal of deterrence.

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[11] We estimate the inflation-adjusted amount to be approximately $242,000.

III.

Finally, we note that a recent decision of the United States Court of Appeals for the Seventh Circuit emphasized the importance of determining whether our civil money penalties fall within the maximum permitted by the Act. *See Slusser v. CFTC,* 210 F.3d 783, 786 (7th Cir. 2000). In our recent decision on remand, we reiterated that we would follow a "broad but common sense approach" to determine the number of "violations" at issue for purposes of the $100,000 per violation approach to civil money penalties. *In re Slusser,* [Current Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 29,411 (CFTC Feb. 28, 2003). Here, for example, the record establishes that Miller fraudulently solicited seven customers. If we treat the deception of each customer as one violation, the maximum civil money penalty would be $700,000. Since this limit far exceeds the amount of the penalty we are imposing, we need not specifically determine whether the Complaint in this proceeding reasonably could be interpreted as alleging more than seven violations.[12]

## CONCLUSION

In light of the foregoing, we impose a $350,000 civil money penalty on Miller.

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[12] As we noted in *Slusser, supra,* the violation count in most Commission cases could range from dozens to hundreds of violations. Here for example, the record establishes that Miller called some customers repeatedly to encourage them to open accounts. In these circumstances, each phone call could be viewed as a separate fraudulent solicitation, increasing the violation count several fold.

IT IS SO ORDERED.[13]

By the Commission (Chairman NEWSOME; Commissioner LUKKEN, joining the majority and also concurring separately; Commissioner BROWN-HRUSKA, concurring in part and dissenting in part).

/s/ Catherine D. Dixon
Catherine D. Dixon
Assistant Secretary of the Commission
Commodity Futures Trading Commission

Dated: July 23, 2004

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## Opinion of Commissioner Sharon Brown-Hruska, Concurring in Part and Dissenting in Part

To determine the scope of a respondent's wrongdoing in a customer solicitation case, the Commission generally relies upon the testimony of a handful of the broker's customers and the results derived from a financial audit of his customers' performance.[1] Where such testimony

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[13] Respondent's sanction shall become effective 30 days after the date this order is served on the party. A motion to stay any portion of this order pending reconsideration by the Commission or judicial review shall be filed and served within 15 days of the date this order is served. *See* Commission Rule 10.106, 17 C.F.R. § 10.106.

[1] *See e.g., In re JCC, Inc.*, [1992-1994 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 26,080 (CFTC, May 12, 1994), *aff'd JCC, Inc. v. CFTC*, 63 F.3d 1557 (11th Cir. 1995) (imposing $510,000 penalty on individual based upon testimony of "several dissatisfied customers" out of 446 accounts); *In re Grossfeld*, [1996-1998 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 26,921 (CFTC, Dec. 10, 1996), *aff'd Grossfeld v. CFTC*,

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reveals that the broker consistently employs a standard and misleading sales pitch, the Commission infers that he used it to induce his other customers to open trading accounts with him.[2] In such circumstances, the Commission reasons that it is appropriate to attribute most of the broker's financial gains, and correspondingly most of the losses suffered by his customers to his misconduct.[3] Finally, to estimate the respondent's ill-gotten gains, the

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137 F.3d 1300 (11th Cir. 1998) (imposing penalties of $1.8 million and $500,000 on two individuals based on testimony of 17 customer witnesses and an audit of 257 customer accounts revealing losses); *In re Gordon*, [1994-1996 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 26,326 (CFTC, Mar. 6, 1995) ("*Gordon II*"), *aff'd without opinion sub nom. Gordon v. CFTC*, 86 F.3d 1169 (11th Cir. 1996) (imposing $200,000 penalty upon AP based on testimony of five customers and audit of 134 customer accounts).

[2] Or as the Commission put it here, that Miller's fraud "clearly played a significant role in convincing his customers to expose themselves to the risks of commodities markets."). ¶ 27,297 at 46;350 n.13. *See Gordon II*, ¶ 26,326 at 45,592 (respondent's solicitation fraud "played a significant role in convincing his customers to expose themselves to the risk of the futures markets."). *See also, In re R&W Technical Services, Ltd.*, [1998-1999 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 27,582 at 47,748 n.60 (CFTC, Mar. 16, 1999) ("Because . . . nearly 100% of [R&W's] customers during the relevant time period learned about the company through the[ir] advertis[ing], it is reasonable to conclude that all of R&W's customers relied on the advertised claims in making their purchase decisions.").

[3] *See Grossfeld*, ¶ 26,921 44,469 n.37 ("Given the pervasive and ongoing nature of the fraud, we may also infer that virtually all the money CCC paid to Stein was a product of his wrongdoing."); *JCC*, ¶ 26,080 at 41,582) ("We can reasonably infer, however, that [respondent] benefited handsomely from the commissions earned as a result of the fraudulent solicitation methods employed at JCC"); *Gordon II*, ¶ 26,326 at 45,592 ("The Division's evidence establishes that the losses suffered by Gordon's customer's exceeded $1 million. While Gordon's fraudulent activities were not the sole cause of these losses, they played a significant role in convincing his customers to expose themselves to the risk of the futures markets.").

Commission generally looks to the gross revenues or commissions that the respondent generates from his customers.[4] Until recently, these simplifying assumptions met with the approval of most courts when passing on the appropriateness of our penalties.[5]

Here, however, the Ninth Circuit has told us that we can no longer indulge in such assumptions – that in this instance, we cannot assume that Miller solicited all his customers in the same manner as he had with the seven who testified against him, notwithstanding our finding that his fraud was "widespread and continuous." Nor can we attribute the losses suffered by Miller's customers along with the income he derived from them to his fraud without direct proof of causation. In short, the court held that the causal link between a respondent's wrongdoing and the consequences flowing from it could no longer be based upon such "arbitrary" assumptions. Combined with the Fifth Circuit's rejection of our use of gross revenues for measuring a respondent's wrongful gains in the *R&W* case,[6] virtually all of the, simplifying assumptions that we had regularly relied upon in the past – and that until now

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[4] *See e.g., In re Gordon,* [1992-1994 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 25,667 at 40,182 (CFTC, Mar. 16, 1993) ("*Gordon I*") (interpreting "financial benefit" accruing to a broker for civil penalty purposes as "his commissions"); *R&W,* ¶ 27,582 at 47,748-49 & n.62 (basing financial benefit to respondents in a penalty calculation on "gross sales estimates").

[5] *See JCC, Inc. v. CFTC,* 63 F.3d 1557 (affirming imposition of penalties ranging from $50,000 to $510,000 against three individuals based upon gross commission charges they generated for FCM); *Grossfeld v. CFTC,* 137 F.3d 1300; *Gordon v. CFTC,* 86 F.3d 1169.

[6] *R&W Technical Services, Inc. v. CFTC,* 205 F.3d 165, 178 (5th Cir. 2000).

had regularly survived judicial scrutiny – have come under attack.

In response, the Commission, carefully confining itself to the record developed from seven witnesses who testified against Miller, has concluded that a penalty of $350,000 is appropriate for a broker. Although this represents a substantial reduction from the original penalty of $600,000 assessed against Miller in 1998, it still constitutes a significant penalty, albeit one that nevertheless still provides the respondent with a decent return on his investment in wrongdoing. So what's wrong with this picture?

The problem is that in complying with the Ninth Circuit's mandate, the Commission has implemented a change in policy that undermines the goal it seeks to advance – deterring future wrongdoing of the kind witnessed here. The Commission does this by overturning its carefully reasoned decision in *Grossfeld* – reached only seven years ago – to abandon giving significant weight to the penalty levels imposed in prior "comparable cases." Instead, the Commission reverts back to the pre-*Grossfeld* era of looking to the past as guide for calculating penalties. This change, in my view, only compounds the problem that the Commission initially created in the *R&W* decision of last year, when it acquiesced to the mandate of the *Fifth* Circuit that gains-based monetary penalties be drawn from the respondent's *net* – rather than upon gross – wrongful gains, and furthermore, incorporated it as a permanent feature of our standard.[7]

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[7] *In re R&W Technical Services, Inc.*, [Current Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 29,556 at 55.391-92 & n.15 (CFTC Aug. 6,

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Taken together, these two actions make it more difficult to deter future wrongdoing. Resorting to penalties imposed in prior cases – even if they are used only as a rough guide – sets a bad precedent. Recall we abandoned using that tool for guidance in 1996 for a good reason – after concluding that it "*undermined*" the deterrent effect of our penalties.[8] Our decision in *Grossfeld* unchained us from a legacy of haphazard and negligible penalty levels imposed on numerous respondents whose conduct was in many cases egregious. Guidance from the past might make sense if we possessed a reservoir of comparable cases where the sanctions imposed were carefully based upon economic deterrent principles. Unfortunately, we do not possess such a foundation to build upon. Rather, we have a body of precedent that with few exceptions levies fines that pale in comparison to the gains or losses flowing from the respondent's conduct. This is illustrated by the cases that the Commission cites in footnote nine of its opinion – all of which involve imposition of penalties that are significantly less than the respondent's wrongful gains.[9] Despite acknowledging that this outcome "is not an

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2000) (interpreting Division's burden of proof under Section 6(c)'s treble monetary gain approach to determining maximum allowable civil money penalties as requiring it "to establish net profits with reasonable precision based on actual revenues and actual expenses").

[8] *See Grossfeld*, ¶ 26,921 at 44,468 & n.35.

[9] *See e.g., In re Nikkhah*, [1999-2000 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 28,129 (CFTC May 12, 2000) (assessing a $200,000 penalty for fraudulent allocation scheme that resulted in customer losses greater than $550,000); *In re Commodities International Corp.*, [1996-1998 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 26,943 (CFTC Jan. 14, 1997) (levying fines of $208,000 to $212,000 each against a commodity pool operator and two individuals involved in fraudulent scheme that generated fees of almost $3 million and that led to even greater losses for their customers).

infrequent result," the Commission, without explanation, asserts that basing our penalties upon such case law is now called for.

Reliance upon such deterrence-deprived precedent, however, undermines our effectiveness as an enforcement agency. Although the court found fault with the manner by which we calculated the penalty here, it expressed no misgivings concerning our efforts to fashion a monetary penalty that would promote deterrence. In remanding this matter to the Commission four years ago, the Ninth Circuit explicitly gave us a green light to promote this important value.[10] Indeed, the court observed: "The Commission can set a penalty as a deterrent. *See Lawrence v. CFTC,* 759 F.2d 767, 776 (9th Cir. 1985). Doing so, the Commission is exercising the important and delicate governmental function of punishing illegal conduct."[11] The

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[10] The court stated: "On remand, the Commission is free to fashion a monetary penalty appropriate to the gravity of Miller's offenses and sufficient to act as a deterrent." *Miller v. CFTC,* 197 F.3d 1227, 1236 (9th Cir. 1999).

[11] *Miller v. CFTC,* 197 F.3d at 1236. The inclusion of this passage in the court's opinion apparently was in response to the following exchange between the three judge panel and the Commission attorney that occurred at the appellate oral argument:

> CFTC Attorney: these figures [pertaining to the penalty chosen by the Commission] also reflect another value that I've mentioned before, and that is deterrence.
>
> Judge John T. Noonan: And where does the Commission get the power to do that?
>
> CFTC Attorney: This Court in the *Lawrence* case said that deterrence is a principal function of the Commission. And the Commission case law has – although the emphasis has been more so in recent years – has repeatedly said that deterrence is an important value in assessing the penalty calculation . . . When you are dealing with deterrence, you are

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court's difficulty with our penalty applied solely to how we calculated the wrongful gains and the customer losses, not to our goal of deterring such conduct.

Extrapolating from penalty levels imposed in analogous cases does not address this concern. Nor does it shield us from the kind of problems that we encountered in this case, because our past cases share the very shortcomings that the Ninth Circuit found in *Miller*. Indeed, the *Gordon* case – the case that the Commission uses for comparison purposes – suffers from reliance upon the very same assumptions that so troubled the Ninth Circuit in *Miller*.[12] In short, if the Ninth Circuit will not allow the Commission to indulge in such inferences directly, it seems

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> trying to avoid two problems: underdeterrence and overdeterrence. If you set a penalty that underdeters, you are only going to encourage future misconduct.
>
> . . . .
>
> CFTC Attorney: And again . . . the Commission's emphasis in all these cases is more and more on deterring future misconduct, and it places a value on that here. It also places a value on, in this case in regards to the penalty, in depriving Mr. Miller of the bulk of his earnings, which the Commission believes is based on fraudulent conduct.

*Miller v. CFTC*, No. 98-70360, Oral Argument (9th Cir. Nov. 4, 1999).

[12] As it did here, the Commission in *Gordon* relied upon the testimony of only a handful of customers (five) to estimate the gains derived from and the losses suffered by a much greater pool of customers (134). In addition, the Commission in *Gordon* engaged in the kind of factual inference that the Ninth Circuit in *Miller* held was arbitrary – that Gordon's fraud was largely responsible for his customers' out-of-pocket losses exceeding $1 million. *Gordon II*, ¶ 26,326 at 45,592. Although *Gordon* was summarily affirmed by the Eleventh Circuit, it seems doubtful that the Ninth Circuit would take the same view in light of the inferences relied upon in that matter.

unlikely it will allow us to do so indirectly – by bootstrapping the penalty from an equally flawed analogous case.

Nor does basing a penalty upon the respondent's "net" financial benefit help us.[13] Simply put, deterrence requires that a penalty be based upon a multiple of the revenues that the respondent expects to obtain from his prospective victims, not on the accounting profit that he actually realizes. Moreover, we should consider what kind of signal we are sending to the marketplace when we allow a person whose profession is fraud to deduct all of his "business expenses" so that he can "legitimately claim [such expenses] to reduce his net financial benefit." Leaving aside the wisdom of reducing a respondent's wrongful gains by the amount he incurs in planning his crime, defrauding his customers, and evading detection, it seems an unproductive use of our resources for us to take on the kind of forensic accounting that is necessary to develop the record on this score with "reasonable precision." It also seems highly unlikely that the Division of Enforcement will be too keen on accepting this burden if the *Walters* case is any indication.[14]

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[13] Equating a broker's ill-gotten gains with his net profits has little to do with promoting rational penalty policy for reasons that I explained in my dissenting opinion in the *R&W* case. *See* ¶ 29,556 at 55,394-96.

[14] *See In re Walters,* [2000-2002 Transfer Binder], Comm. Fut. L. Rep. (CCH) ¶ 28,686 (ALJ Nov. 29, 2001). In *Walters,* Administrative Law Judge George H. Painter imposed a $2.4 million monetary penalty upon respondent Walters based upon the his finding that Walter's wrongdoing resulted in a monetary gain to him of $800,000. *In re Walters,* [2000-2002 Transfer Binder], Comm. Fut. L. Rep. (CCH) ¶ 28,459 (ALJ Feb. 9, 2001). On appeal, the Commission's remanded the matter to the ALJ to develop the record to permit a reliable calculation of Walter's *net* financial benefit based upon *R&W* principles.

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If the Commission were merely undertaking "a more diligent and careful application of our existing precedent rather than a fundamental change in that precedent" as it professes to be doing, I would have no problem with the action. But the changes adopted in both this matter and R&W represent a radical departure from the procedures that the Commission embraced in recent times in *GNP Commodities, Grossfeld,* and *Gordon* to more closely align our sanctions with the principles of deterrence. On that score, they undercut *GNP*'s admonition that while "[c]ivil monetary penalties cannot be calculated with precision . . . such penalties may be rationally devised in accordance with the purposes [of deterrence]."[15]

While it may be too costly to calculate gains and losses with precision, as the Division's experience in the *Walters* matter suggests, I am confident that with a little effort our penalties can be devised to comply with the Ninth Circuit's mandate without resorting to either of the blunt tools that the Commission is adopting here. We can do so by ensuring that the customers who testify for the Division in such

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*In re Walters,* [2000-2002 Transfer Binder], Comm. Fut. L. Rep. (CCH) ¶ 28,657 at 52,572 (CFTC Oct. 3, 2001). Rather than undergo this burden, the Division on remand filed a motion to withdraw its request to impose a $2.4 million penalty upon him based on its view that such an undertaking did "not seem to be a worthwhile use of resources." Although Judge Painter's order attributed this request to the Division's view that it was "unlikely" that the penalty could be collected, ¶ 28,686 at 52,673, "[t]here is reason to believe that the Division's decision not to pursue a civil monetary penalty stemmed from a recognition that *Walters'* synthesis of *Miller* and *R&W* demands too much effort." *In re First Financial Trading, Inc.,* [2002-2003 Transfer Binder], Comm. Fut. L. Rep. (CCH) ¶ 29,089 at 53,705 & n.202 (ALJ Jul. 8, 2002).

[15] *In re GNP Commodities,* [1990-1992 Transfer Binder], Comm. Fut. L. Rep. (CCH) ¶ 25,360 at 39,222 (CFTC Aug. 11, 1992).

cases are representative of the respondent's entire pool of customers. The proper way of doing this, in my view, is by conducting a statistically valid sample of the respondent's customers. That is what other agencies do in similar circumstances,[16] and that is precisely what the court had in mind when it insisted that our witnesses be part of "a statistically significant group."[17]

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[16] The Federal Trade Commission, for example, uses survey methodology to obtain valid samples from the appropriate population when seeking to determine how consumers as a whole interpret an advertisement. *See In re Thompson Medical Research Co., Inc.*, 104 F.T.C. 648, 789-90 (1984), *aff'd Thompson Medical Co. v. FTC*, 791 F.2d 189 (D.C. Cir. 1986), *cert. denied*, 479 U.S. 1086 (1987).

[17] *Miller v. CFTC*, 197 F.3d at 1236. At oral argument, two members of the panel echoed this view. In response to the CFTC's representation that taking testimony from all of Miller's 347 customers was not feasible, the court observed:

> Judge Harry Pregerson: Maybe you take a random sampling and you learn from a statistician or whomever that out of three hundred so and so, if you got five percent, there's a plus or minus factor . . .
>
> CFTC Attorney: All I can say is that the Division of Enforcement approaches this type of case very similar to that here. It goes over the entire sample of customers and it chooses what it believes to be representative.
>
> Judge Noonan: I would have thought that they would have chosen the worst cases to prosecute. You get the ones who are really angry and . . .
>
> . . . .
>
> Judge Noonan: It seems to me that if you are going to impose a legal penalty, you've got to have some real evidence to say this is what the fellow did.
>
> CFTC Attorney: The evidence that the Commission has is that the aggregate losses of 347 customers was $1.3 million.
>
> Judge Noonan: That's right, that's fine. But how do we know that it was caused by his misconduct?

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Taking on this task no doubt will impose costs upon the Division and upon us, but in the long run it will turn out to be far less burdensome than requiring the Division to undertake what the Commission contemplated in its ill-fated *Walters* decision. In addition, it will provide the added benefit of allowing the other shortcomings mentioned by the court to fall by the wayside. For if we can satisfy the court that our customer witnesses are representative then we will have a reliable basis upon which to draw inferences regarding the extent to which a respondent's employed a misleading sales pitch, the financial benefit he derived from his misconduct, and the harm suffered by his customers.

/s/ Sharon Brown-Hruska — 3/16/2004
Commissioner Sharon Brown-Hruska — Date

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CFTC Attorney: It's based on the premise that these people would not have incurred these losses had they not been fraudulently induced. That fraud played a significant portion of their investments . . .

Judge Noonan: But we don't know that. That's just a guess.

CFTC Attorney: Right. If you're asking for a mathematical formula . . .

Judge Noonan: No, I'm just asking for evidence, the usual way we get evidence. As Judge Pregerson said, you could have taken a representative standard, say how many, what percentage . . . There are ways of statistically making the determination. But it is not by taking seven people are cooperating with you and say they're representative.

**Opinion of Commissioner**
**Walter L. Lukken, Concurring**

I write separately today to reiterate my support for the Majority opinion and to respectfully address some of the points raised by my colleague in the dissenting portions of her opinion. Both Commissioners in the Majority strongly favor deterrence as a policy goal in imposing adjudicatory sanctions, and believe that the $350,000 penalty imposed by the Commission today achieves that end. In my view, deterrence can only be realized through the imposition of soundly reasoned penalties that are supported by the factual record of a particular case. Indeed, the Commission is instructed on appeal by the Ninth Circuit to calculate an appropriate penalty that, while serving as a deterrent, is "grounded on the record before the agency." *Miller v. CFTC,* 197 F.3d 1227, 1236 (9th Cir. 1999).

The dissent contends that a deterrence-based penalty should be based on the revenues that a respondent expected to obtain from his victims. I fear that such a 'state of mind' determination could prove inconsistent with the judicial standards espoused by the Ninth Circuit, and would present intractable proof problems in future cases. Defining and proving expected gains would be significantly more difficult and subjective than our agency's recent struggles with the *R&W* decision and the more exact statutory term of "gain." *R&W Technical Services v. CFTC,* 205 F.3d 165, 178 (5th Cir. 2000). While I appreciate the economic theory behind such a proposal, its application in a court of law would appear problematic. Deterrence would not be achieved by imposing penalties that are likely to be rejected for a lack of proof or overturned on appeal.

I also would like to discuss my colleague's description of the Majority's use of comparable cases. The dissent contends that the opinion's use of comparable cases is a "radical departure" that overturns the Commission's 1996 decision in *In re Grossfeld* [1996-1998 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 26,921 (CFTC Dec. 10, 1996). However, I believe this to be a mischaracterization of the Majority opinion. The *Grossfeld* case stated that the Commission would no longer accord "substantial weight" to comparable case analysis.[1] *Id.* at 44,468. Since *Grossfeld,* the Commission has utilized comparable case analysis on some occasions and dispensed with it on other occasions.[2] The Majority is simply clarifying that the

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[1] In *Grossfeld*, the Commission stated:

> [W]e agree with the ALJ that effective deterrence can be undermined by an undue focus on the levels of civil money penalties that we have imposed in prior cases. Indeed, in our experience, it is rare that we find cases to be truly analogous on the factors material to the selection of an appropriate civil money penalty. Moreover, a policy of giving *substantial weight* to civil money penalties imposed in prior cases fails to account for either changes in the regulatory environment and sanctioning policy of the Commission or the role inflation plays in undermining the deterrent effect of a money penalty over time.

*Id.* at 44,468 (emphasis added).

[2] For example, in *In re Mayer*, [1996-1998 Transfer binder] Comm. Fut. L. Rep. (CCH) ¶ 27,259 at 46,141 (CFTC Feb. 3, 1998), decided after *Grossfeld*, the Commission made reference to its practice of looking at sanctions in previous comparable cases. Similarly, in *In re Glass and Guttman* [1996-1998 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 27,337 at 46,561-9 (CFTC April 27, 1998), the Commission acknowledged giving weight to comparable cases in assessing the civil penalty. Only in *In re Slusser* [1998-1999 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 27,701 (CFTC July 19, 1999) did the Commission uphold an Administrative Law Judge's assessment of a civil penalty where comparable cases were not considered. In this regard, the

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consideration of comparable cases is one of the tools that may be used to arrive at a specific penalty once a general gravity determination has been made. In so doing, the majority has forthrightly cautioned that it intends to give due regard, on a case-by-case basis, to those circumstances that may justify giving comparable cases less weight. Slip. Op. at 11-12.

In my view, this position is well balanced and consistent with *Grossfeld*. Indeed, the foundation of our common law system is based on the consideration of past precedent in order to keep the law's application consistent, transparent and predictable. When reaching a decision on penalties, the Commission should not be denied outright the ability to properly weigh the similarities and differences of past cases and to apply them to the specific facts of a case before it. Such a denial would have the unfortunate effect of taking away one of our tools of reasoned thought in an area where the Commission needs such decisional equipment in its toolbox. I believe that justice would not be served by such a Commission position.

/s/ Walter L. Lukken
Commissioner
Walter L. Lukken

7-22-04
Date

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Commission stated in a footnote "in deciding *Grossfeld*, the Commission directly rejected its earlier approach to evaluating sanctions and announced that comparability with sanctions imposed in prior cases is no longer an element of its sanctions analysis." *Id.* at 48,319, n.33. However, this seems to go beyond the holding in *Grossfeld*, which only found that the Commission would no longer give substantial weight to comparable case analysis.

*MILLER v. COMMODITIES FUTURES TRADING COM'N*, 197 F.3d 1227 (9th Cir. 1999)

HOWARD MILLER, Petitioner, v. COMMODITIES FUTURES TRADING COMMISSION, Respondent.

No. 98-70360.

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Argued and Submitted November 4, 1999

Filed December 20, 1999

COUNSEL

Robert E. Thompson, San Francisco, California, for the petitioner.

Robert S. Zwirb, Assistant General Counsel, Commodity Futures Trading Commission, Washington, D.C., for the respondent.

Appeal from the Commodities Futures Trading Commission.

Before: Harry Pregerson, John T. Noonan and Diarmuid F. O'Scannlain, Circuit Judges.

NOONAN, Circuit Judge:

[2] Howard Miller petitions for the review of a final order of the Commodities Futures Trading Commission (the Commission or the CFTC). Miller has been found to have committed fraud in soliciting customers in violation of § 42(b) of the Commodities Exchange Act (the CEA or Act), 7 U.S.C. § 6c(b). The Commission has issued a cease and desist order, a revocation of his license, a lifetime ban

on his trading on the commodities futures exchange, and a fine of $600,000. The Commission's case was begun in November 1991, based on actions between 1978 and 1989. The case has taken just eight years to reach this court, creating some doubt as to the deterrent effect of the Commission's efforts. Nonetheless, we find no basis to disturb the Commission's decision as to fraud or the imposition of sanctions, with one exception. We hold that the fine imposed by the Commission had no basis in the record and was therefore an abuse of its discretion. We remand for reconsideration of the penalty.

## FACTS AND PROCEEDINGS

[3] From 1981 to 1991, Miller was an account executive of Siegel Trading Company, a futures commission merchant, registered with the CFTC and doing business in Los Angeles and Chicago. Miller himself was registered with the Commission as an AP or associated person engaged in the solicitation of customers' orders. Prior to joining Siegel, Miller had had no education or experience in trading commodity options. At Siegel he was an active trader and also appeared on television commercials for the firm, emphasizing the money to be made in options trading.

[4] Between 1984 and 1989 Miller handled 347 accounts. According to the testimony of a CFTC investigator, nearly 80 percent of his customers lost money trading options. In the period January 1, 1987-July 31, 1989, losses by his customers were large. At the same time Miller was making money. His customers paid a commission of 40 or 45 percent of the options price, plus a $155 fee for

initiating each option position, and a $155 fee to close out each position.

[5] On November 19, 1991, the Division of Enforcement of the CFTC charged Miller with violation of 7 U.S.C. § 6c(b). Two years later, an Administrative Law Judge conducted hearings on the complaint. Seven of Miller's customers testified against him as follows:

1. Lloyd Barnes

[6] Lloyd Barnes made numerous transactions between July 14, 1987 and July 18, 1990. Miller initially cold-called him, offered him Swiss francs, and said that if Barnes were to invest, Miller "pretty much could triple [his] money." Miller called Barnes three more times before Barnes agreed to buy.

[7] Miller claimed that 80 percent of his clients made money. Miller never told Barnes of the risk that he could lose all his money. Barnes told Miller that he spent most of his time traveling, so that he could not watch his investments, and Miller said he would watch the investments for Barnes. When Barnes declined to purchase an option on sugar, Miller called back an hour later, telling Barnes that by waiting an hour, Barnes had lost $1,000. When Barnes again declined, Miller called back twenty minutes later, offering Barnes the original price, even though the price had subsequently changed. Miller claimed that he could triple Barnes' money on that deal. In 1987, Barnes agreed to be Miller's customer.

[8] The next day, by Federal Express, papers arrived. The normal process at Siegel was to require each customer to listen to a tape-recording that warned of the risks of

trading commodity options. The tape-recording was played by a supervisor known as a verifier. By the time Barnes had a conversation with a verifier, he believed he already had a commitment to purchase. At the time of the sale, Barnes believed that he was purchasing the Swiss francs themselves, not an option. Miller did not discuss fees and commissions, and Barnes did not learn of the fees and commissions until his second or third statement. On several occasions, Miller used the word "guarantee," explaining to Barnes that if Barnes lost on a particular investment, Miller would match him dollar for dollar. Barnes testified that he lost $35,000 through trading with Siegel through Miller.

2. Donald Kenneth Black

[9] Donald Kenneth Black made numerous transactions through Siegel between October 28, 1987 and February 10, 1988. Black purchased options from Miller for the first time in October 1987. Black had no prior options experience, although he did have mutual funds. Miller called Black and had ten or twelve telephone conversations with him before Black sent Miller any money. Miller stated at the time that his clients were making large returns on their investments in gold and soy beans, doubling or tripling their investments. Miller stated that sometimes his customers could quadruple or quintuple their investments in short periods of time: sometimes in less than thirty days, and mostly in under ninety days. Miller claimed that due to his experience and the experience of his company, they only recommended the better options to their clients and anticipated large returns. Miller admitted that there was a risk of losing the amount of the investment; however, Miller indicated that total

losses rarely occurred because Siegel monitored investments on a daily basis and sold them if their value was declining. Miller indicated that he was investing personally in the commodities he recommended. Miller said that an investor could make a much better return on commodities than in a savings account or mutual fund. Black testified that, at the time, he understood the options to be an investment.

[10] When Black agreed to purchase an option, Miller sent out a messenger to pick up the certified check and to bring forms for Black's signature. Miller claimed that a certified check was necessary in order to make the trade that morning; even if he didn't pick up the check that morning, Siegel would front the funds to make the purchase until the check arrived. Miller stated that the price of the option was going up every minute. At that time, before reading the risk disclosure forms, Black believed that he had made a commitment to purchase the option. Black did not read the forms that the courier brought, since the courier arrived at 5 p.m. when Black's office was closing. Miller had told him that the risk disclosure statement was a formality, and that any risk was going to be minimized by Miller's expertise in recommending and monitoring options. Black believed that the purpose of the verification taping was to have a record of the transactions, although the verification taping indicated there was a risk that Black could lose his investment. At the time of purchase, Black understood that Miller would receive a $155 commission; however he did not understand that, before that commission was added, the price had been marked up 45 percent. When Black later learned how much the commissions were and

questioned Miller, Miller explained that the commissions were necessary to cover the cost of the research.

[11] Black purchased another eight or nine options from Miller. After his purchase of the second or third option, he realized that the options were losing money and purchased the additional options trying to break even. Black indicated that he had tried to liquidate options when their values were declining, but that Miller resisted liquidation because he felt that the options were going to go up. Black invested a total of about $21,000, and his losses were about $12,000.

### 3. Lee Patrick Cowan

[12] Lee Patrick Cowan, a self-employed chiropractor, made numerous transactions through Miller between November 10, 1988 and April 12, 1989. Miller first called Cowan about a copper option. Miller claimed that Cowan could double or triple his money by the end of November or early December, and that it was almost a guaranteed deal. Miller did not mention the risk that Cowan could lose the money. Miller claimed that in the previous year, all of his customers had made money. Cowan compared the Siegel commissions with those of Shearson Lehman prior to his initial purchase. When Cowan asked Miller why Siegel's commissions were substantially higher than Shearson Lehman's, Miller claimed that Siegel had the largest research unit looking at options. He said that Siegel's prices were higher because they gave their customers "the first bite" at the option, and, after the customers used the research, Siegel sold the research to other brokerage houses. Cowan agreed to purchase the option for $3,000 or $4,000. At the time, Cowan knew nothing about options.

Miller indicated that there was some risk, but never indicated that a total loss was realistic.

[13] Miller later called Cowan and convinced him to buy a second option in November. Miller told Cowan that another customer had bought $100,000 worth of the option, so that Miller could get Cowan a good deal on the option. In late November, Cowan purchased a third option, which Miller told him was for insurance on the other two options. Cowan did not understand that he could lose any money on this option and thought that this option was different than his other two options. Cowan invested a total of $11,000 and expected to have $33,000 at the end of his options.

[14] Cowan later had a talk with a friend, who explained the nature of options. In early 1989, Cowan asked Miller what the options were worth at that time, and Miller said they were worth about $500. Cowan asked Miller to sell the options. Miller said that he could not, but gave no reasons. Cowan's options expired worthless.

### 4. Armand George Mezey

[15] Armand George Mezey did business with Miller from late 1987 or early 1988 until the end of 1988 or the beginning of 1989. Miller initially called Mezey. At the time, Mezey had already invested with Siegel in T-bonds and had lost all the money he invested. Miller convinced Mezey that the reason he had lost money with his previous Siegel broker was that the previous broker had let the option expire. Miller assured Mezey that he would watch to make sure none of Mezey's options expired. Miller convinced Mezey that he was an expert, and that Mezey could recoup his losses by investing in certain options.

Miller claimed that many of his other customers were investing heavily in these options and were making money. Miller said that he would invest in the options, if he was able, but claimed to be unable to invest. Miller indicated that in the past other customers had doubled or tripled their money in this particular investment. Mezey testified that, at the time of the initial sale, he did not really understand what an option was, nor did Miller explain options to him. When Mezey's options lost money, Miller would blame the loss on the economy and then mention another opportunity that would recoup Mezey's losses. Miller only advised Mezey to sell something when it had already gone down substantially in value. Miller suggested that Siegel's research department was extensive and had a good track record.

### 5. Michael Scully

[16] Michael Scully, an insurance attorney, had an account through Miller from January 1991 to May 1991. Miller cold-called him in 1991. Scully had no finance background and no investments except for $2,000 in an IRA. Miller indicated that they had spoken before about the Japanese yen, and that if Scully had invested as Miller had advised, Scully would have tripled his money. Scully indicated that Miller must have him confused with someone else because they had never spoken. Miller responded that they had spoken before, and that he wanted to sell Scully "a deutschemark." Scully did not, at that time, understand whether an actual deutschemarks or options on deutschemarks were being discussed. Miller explained that if a rating system moved up six points on a particular T-bond, then Scully would triple his money, and Miller thought the rating would move even higher than that.

Miller claimed that he would not steer Scully wrong because he made most of his money on repeat business. Miller indicated that, so far in 1991, he was making a killing for his clients, that the year before had been so-so, and that the year before that, he had made a killing for his customers. Miller did not mention his qualifications as a broker. Scully testified that Miller did not mention any risk that Scully might lose all his money.

[17] When Scully indicated that he was interested in a T-bond, Miller sent a messenger with an article and forms. The messenger would not leave until Miller called Scully back. When Miller called back, he indicated that the T-bond had gone up another point, and that Scully had to get in immediately to guarantee his profit margin. Scully agreed.

[18] When the disclosure form was read to Scully, he noticed that the disclosure of the risk involved in commodities was contrary to what Scully had understood from his conversations with Miller. Scully testified that Miller told him that the disclosure form was "a formality" drawn up by attorneys, but that the T-bond was a winner. Scully testified that when he signed the document he understood that commodities were riskier than stocks or mutual funds. Scully testified that when Miller told him of the cost of the T-bond option, Miller did not explain how much of the amount was fees and commissions. Scully learned that the commission rate was 40 percent from the verifier.

[19] After purchasing the T-bond option, Scully called Miller later that day or the next day and indicated that he "wanted out," Miller told him that it was too late; the money had already been invested. Subsequently, after Scully lost the money he had invested, he wrote a complaint

letter to Siegel, who, after some discussions, refunded the amount of Miller's commission.

### 6. Eddie Timmons

[20] Eddie Timmons had an account with Siegel from approximately June 8, 1990 through May 31, 1991. Miller [sic] testified that in June 1990, Miller called him about buying cotton futures. Miller claimed that Timmons should be able to double or triple his money within 30 days, due to crop failure in Texas. Miller claimed that his other customers were doing well. Timmons agreed to buy. Timmons thought that he had made a commitment to purchase an option at the time when he said yes to Miller. Timmons could not recall whether the packet of information on futures trading arrived before or after he had made this commitment. When the verifier called Timmons, Timmons attempted to ask her questions, but she responded that it was not her job to answer questions. Timmons could not recall whether anyone from Siegel ever asked him whether he could sustain a loss of the funds he had invested. Miller claimed that he had been in the business for more than 20 years and had a good record. Before making his purchase, Timmons understood that options were riskier than stocks, and that he could lose his investment.

[21] Timmons also purchased a cattle option on June 13, 1990. Miller had claimed that cattle always went up around July 4, and that two rancher long-term clients of his made money purchasing this option every year at this time. On one occasion, Miller called Timmons and said that he had just tripled his money and made $180,000. When Timmons, confused, said that he did not have any options at that time, Miller claimed to have gotten

Timmons's number confused with another client, Ed Timmerman. Miller then offered Timmons a deal. Miller never told Timmons that he should sell an option. When Timmons complained to Miller that he was not making any money, Miller responded that Timmons just happened to be unlucky and that the rest of his customers were doing great.

### 7. Robert Weaver

[22] Robert Weaver, a landscape architect, testified that Howard Miller cold-called him in 1988, introduced himself as the Howard Miller on television, and wanted Weaver to buy a contract on soybeans, which Miller described as a sure winner and a no-miss proposition. Miller claimed that he was buying such contracts himself, that all his clients were buying them, and that they were all making money. Weaver testified that Miller was very bold, "in that there was just an absolute certainty; guaranteed." Miller did not discuss any risks. Weaver bought the contract right away.

[23] Miller claimed that Weaver had to send a check immediately, because the contracts run by three-month periods. Miller sent Weaver the papers after Weaver had sent his check, and Weaver filled out the forms without examining them. Miller did not explain what amount of the purchase price was fees and commissions. At the time the verifier called and explained to Weaver, for the first time, that he might lose all the money, he had already sent in his check and believed himself to have already purchased the option. Weaver believed the disclosure statement to be a "standard disclaimer" like "'hazard to your health' on a pack of cigarettes." Weaver made about $300

from the first option, after Miller advised him to sell. Weaver subsequently purchased more options that Miller told him were sure money-winners. When Weaver would express reluctance to buy, Miller would tell him Weaver couldn't afford not to buy, and that he would get all his money back and more. Toward the end of the relationship, Miller told Weaver that Miller would loan him the money to purchase additional options. Weaver declined.

[24] The Defense. Miller denied that he told customers they could double or triple their money, or that he guaranteed that they would profit. Jennifer Nicole Martin, his assistant at Siegel, testified that Miller explained all risks, commissions, and other relevant factors to his customers prior to their purchase of an option contract. Martin stated that she could overhear Miller's phone calls to his customers and never heard Miller make guarantees of profit. Miller also claimed that he informed his customers that more than 80 percent of all commodity speculators lose money. Miller also relied on the verifier's taperecordings and the disclosure of risk forms.

[25] The ALJ's Opinion. On May 25, 1994, the ALJ issued his decision. In re Miller [1992-1994 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 26,084. The ALJ resolved the conflict in testimony by finding Martin and Miller not credible, characterizing the latter as "an unreliable and evasive witness" and finding the seven customers to have testified honestly. He held that Miller had "engaged in a scheme to cheat and defraud customers and to make large commission profits at the expense of his customers." Miller had made false, deceptive, or misleading statements of material fact, and he had failed to disclose material facts. He had violated 7 U.S.C. § 6c(b) and Commission Regulation 33.10, 17 C.F.R. § 33.10.

Without further analysis, the ALJ ordered Miller to cease and desist from further violations, revoked his registration as an AP, banned him forever from commodity options trading and imposed a civil penalty of $200,000.

[26] Miller appealed the ALJ's findings and sanctions. The Enforcement Division appealed the monetary penalty as inadequate. On June 16, 1995, the Commission affirmed the ALJ's findings as to liability and as to all sanctions except the civil fine, as to whose determination the ALJ was held not to have followed procedures for setting a civil penalty. Accordingly, the case was remanded to the ALJ to redetermine this amount. In re Miller, [1994-1996 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 26,440 (CFTC June 16, 1995).

[27] On remand, the ALJ followed the procedure set out by the Commission in In re Gordon, [1994-1996 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 26,326 (CFTC Mar. 6, 1995), aff'd without opinion sub nom. Gordon v. CFTC, 86 F.3d 1169 (11th Cir.1996). The gravity of Miller's offenses was taken to be established. The ALJ accordingly looked to the benefit to Miller of his conduct and the loss inflicted on his customers by his conduct. The Enforcement Division argued that all his commissions from 1988 through 1991, totaling $637,771.91, should be attributed to his fraud and that all the losses of his customers from 1987 through July 1989, totaling $1,350,623, should also be attributed to his fraud. The ALJ rejected these contentions. He found no correlation established between Miller's violations and his gains or his customers' losses. The "broad assumption" made by the Enforcement Division that there was such a correlation did "not hold weight in a market where there is inevitably going to be one losing trade for every winning trade" and where dishonest advice

could result in a profit and honest advice result in a loss. The ALJ held that only $100,000 of loss was established by the seven customer witnesses. He then proceeded to determine Miller's net worth, noting that under *Gordon* the civil penalty should not exceed it. Miller contended that he had a negative net worth, the Enforcement Division contended that it was the same as his commissions earned – $637,771.91. Without further analysis, the ALJ fixed Miller's net worth at $50,000 and assessed a penalty of $50,000. In re Miller, [1994-96 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 26,722 (ALJ June 21, 1996).

[28] Only Miller appealed. On March 12, 1998, the Commission decided his appeal, In re Miller, [1996-1998 Transfer Binder] Comm. Fut. L. Rep. (CCH), ¶ 27,297 (CFTC Mar. 12, 1998). The Commission noted that Miller had "not provided his tax returns for 1987, 1988 or 1989 and had failed to provide most of the financial records that were required under the subpoena such as check registers and records of expenditures;" he also provided no documentation of liabilities. The Commission held that Miller had waived the right provided by the statute, 7 U.S.C. § 9a, to have his net worth considered. The Commission found enough in the record to set his net worth as in excess of $600,000. Following its own precedents, the Commission held Miller's conduct in defrauding customers to have violated a core provision of the Commodities Futures Trading Act. His misrepresentations had been "egregious." His wrongdoing had followed a pattern extending "over several years." His misconduct had been intentional. He had not attempted to cure his violations, to make restitution to his victims or to cooperate with the authorities; his post-violation conduct aggravated his wrongdoing.

[29] The Commission accepted the Enforcement Division's figures of $637,519.94 of benefit to Miller and $1,351,623 of losses of his customers attributable to his violations of the law. To reach these conclusions the Commission noted the testimony of the seven witnesses and declared: "There is no basis to conclude that Miller acted differently with the other numerous customers whom he solicited at Siegel." The Commission added that its estimate was "very conservative" because "it does not include the losses incurred during a significant period of Miller's misconduct."

[30] The Commission assessed a civil penalty of $600,000. Miller sought a review of this decision of March 12, 1998 in this court. The Commission declined to stay its order pending our review.

## ANALYSIS

[31] Violations of the Commodities Futures Trading Act. In his brief to this court, Miller attacks the finding that he violated the Act. It is not evident that his petition for review of the Commission's order of March 12, 1998 embraces this matter. The Commission's order noted that Miller's liability and the nonmonetary sanctions "were resolved in the first appeal to the Commission" and "may not be relitigated." Hence the order of March 12, 1998 does not address these issues. As we have reviewed the record, however, we note that the ALJ properly resolved the conflict of testimony by finding the customers credible and Miller and Martin not credible. There would be no basis for us to disturb these findings or the conclusion resulting from it that Miller engaged in fraud in violation of 7 U.S.C. § 6c(b) and Commission Regulation 33.10, 17 C.F.R.

§ 33.10, and that the non-monetary penalties are appropriate. That Siegel supplied a warning by taperecording would not have corrected Miller's numerous misrepresentations; nor would Siegel's apparent compliance with the disclosure requirements of Commission Regulation 33.7, 17 C.F.R. § 33.7. Miller's objection to the ALJ's evidentiary rulings in this appeal are not persuasive. *See Levine v. Refco* [Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 24,488 (CFTC July 11, 1989).

[32] Miller alleges generally that "the ALJ's Rulings, Orders and statements made on the record during the hearing, make clear that the ALJ was biased against petitioner and/or his former employer Siegel, and he was predisposed to direct, interpret, and/or suppress the testimony adduced at trial in a manner that would deprive petitioner of his right to a fair and impartial hearing." To demonstrate judicial bias, petitioner must show that the source of the alleged bias is extra-judicial, or that the evidence of bias is pervasive. *See Olson v. Ulmer*, [1990-1992 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 24,987 at 37,627. To set aside an ALJ's findings on the grounds of bias, a party must show an extrajudicial source of bias, or pervasive bias that demonstrates "a deep-seated favoritism or antagonism that would make fair judgment impossible." *Liteky v. U.S.*, 510 U.S. 540, 555 (1994). Miller has alleged no specific facts that would support such a finding.

The Monetary Penalty.

[33] By appealing the ALJ's order, Miller leaped from the frying pan into the fire, and one can understand his dismay at his appeal resulting in a twelve-fold increase of his penalty. The Administrative Procedure Act, 5 U.S.C.

§ 557(b), however, invests the Commission with "all the power which it would have in making the initial decision." The Commission was free to decide that penalty de novo. *See Containerfreight Transportation Co. v. ICC,* 651 F.2d 668, 670 (9th Cir. 1981). In reviewing the agency's decision we defer to its interpretation of the law entrusted to its enforcement. *See Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843 (1984). The Commission has power to assess civil penalties of up to $100,000 per violation. *See* 7 U.S.C. § 9.

[34] We agree with the Commission that Miller's failure to respond with adequate records at the net worth hearing operated as a waiver of the right conferred by 7 U.S.C. § 9a to have his net worth taken into account in assessment of the penalty. *See* In re Nelson Ghun, Comm. Fut. L. Rep., [Transfer Binder 1984-1986] (CCH) § 27,584 (CFTC May 2, 1985). Vital financial data was not disclosed by Miller.

[35] A problem, however, has been created by the Commission's procedure in determining the gain and loss from Miller's fraud. Seven customers testified to Miller's fraudulent acts toward them – Barnes from July 1987 to July 1990; Black from October 1987 to February 1988; Cowan from November 1988 to April 1989; Mezey from later 1987 to early 1989; Scully from January 1991 to May 1991; Timmons from June 1990 to May 1991; and Weaver from May 1988 to February 1989. The Commission stated three assumptions to justify its estimates of Miller's gain and the total of his customers' loss: that he would have treated his other customers as he had the seven; that this treatment caused their losses; and that Miller had engaged in similar misconduct in the six years not touched on by the testimony of the seven customers. These three

assumptions in effect transferred the burden of proof to Miller so that he had to prove he had not defrauded the other customers and that fraud by him had not caused them substantial loss.

[36] Nothing in the record established that the seven witnesses were representative of Miller's 347 customers, nothing shows that they were a statistically significant group. Indeed, there was evidence in the record to the contrary. The losses of the seven witnesses averaged $14,287 apiece. If this average held for the remaining 340 customers, they would have lost a total of nearly $5,000,000; but the Enforcement Division's own calculation for four years showed nothing so enormous even if the calculation was extrapolated to cover ten years. Therefore, the losses of the seven witnesses were not representative.

[37] In the trading of options on commodities futures, as all agree, there are substantial risks. There are always losers. To attribute all customer losses to the fraud of the broker goes in the face of this fact. Similarly, to attribute all of Miller's income to fraud assumes that he never put a customer in the way of a profit and that never in four years of trading gave one piece of honest advice. The assumption is arbitrary.

[38] The Commission can set a penalty as a deterrent. *See Lawrence v. CFTC*, 759 F.2d 767, 776 (9th Cir. 1985). Doing so, the Commission is exercising the important and delicate governmental function of punishing illegal conduct. *Cf. United States v. Halper*, 490 U.S. 435, 448 (1989). In the background are the Eighth Amendment's prohibitions, although constitutional restraints are not at issue here. In the foreground, and determinative, is the law against any exercise of power by a federal agency

that is an assertion of arbitrary power rather than an act of reason grounded on the record before the agency. *See Motor Vehicles Manufacturers Association of the United States, Inc. v. State Farm Mutual Automobile Insurance Co.*, 463 U.S. 29, 42-43 (1983).

[39] On remand, the Commission is free to fashion a monetary penalty appropriate to the gravity of Miller's offenses and sufficient to act as a deterrent.

[40] The petition for review is GRANTED. The case is REMANDED for the Commission to redetermine the monetary penalty.

UNITED STATES OF AMERICA
Before the
COMMODITY FUTURES TRADING COMMISSION

| | |
|---|---|
| In the matter of | CFTC Docket No. 92-4 |
| HOWARD MILLER | OPINION and ORDER |
| Respondent. | (Filed Mar. 12, 1998) |

Respondent Howard Miller ("Miller") appeals from the decision of the Administrative Law Judge ("ALJ") imposing a civil penalty of $50,000 on Miller for fraud in connection with solicitations to customers to buy and sell commodity options in violation of the Commodity Exchange Act ("Act") and the Commission's Rules. We vacated the ALJ's previous assessment of a civil penalty of $200,000 after finding that the ALJ had failed to articulate how the penalty was calculated.[1] *In re Miller,* [1994-1996 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 26,440 (CFTC June 16, 1995). Miller argues on appeal that even this reduced penalty amount is unduly excessive in light of the gravity of his violations and that his net worth is insufficient to pay the civil monetary penalty. He urges us to vacate or to reduce the penalty.

[1] In that opinion, we affirmed the ALJ's assessment of Miller's liability and the imposition of a cease and desist order, a permanent trading prohibition, and revocation of Miller's registration as an associated person.

## BACKGROUND

### 1. The Complaint

On November 19, 1991, we issued a complaint charging Miller with multiple violations of the Act and the Commission's Rules arising out of his solicitation activities while employed as an account executive for a futures commission merchant ("FCM") from January 1987 though April 1991. The complaint charged that Miller, a registered associated person ("AP"), violated the Act and Commission Rules by committing fraud while soliciting customers to buy and to sell commodity options on behalf of Siegel Trading Company ("Siegel"), a registered FCM. The complaint asserted that, in connection with his solicitation of customers for Siegel, Miller cheated, deceived, and defrauded customers in violation of Section 4c(b) of the Act, 7 U.S.C. § 6c(b) (1988), and Commission Rule 33.10, 17 C.F.R. § 33.10 (1997), by making false, deceptive or misleading representations or omissions of material facts. The alleged misrepresentations and omissions concerned: (1) the likelihood of profits from trading in options; (2) the risks involved in trading commodity options; and (3) the performance record, experience, and expertise of Miller and Siegel. Miller's answer denied any wrongdoing.

### 2. The First Hearing

The ALJ held three days of hearings in November 1993. The Division called seven customer witnesses who testified concerning their solicitation by Miller and a Commission investigator who testified regarding her analysis of the trading results of Miller's customers. The customers testified that, in the course of soliciting them to

open accounts with Siegel and to purchase specific options, Miller made a number of claims using phrases such as "this is a sure thing" that led them to believe that they easily could double or triple their money in a short period of time. Hearing Transcript ("Tr.-1") at 13-16, 18-19, 34, 63, 69-70, 84-85, 89, 94, 107, 120, 123, 127, 141, 190, 194, 214, 236-37; Division Exhibits ("D1-Ex.") 5, 11, 14-3. The customers also testified that Miller minimized or failed to disclose the risks involved in commodity options trading and told them that he had a great investment track record and that all or most of his customers were making money, Tr.-1 at 19-20, 39-41, 69, 89, 142, 147-48, 194. In addition, customers testified that Miller told them that the risk disclosure statement, which was communicated to customers via a taped verification telephone procedure, was merely a "formality." Tr.-1 at 18-19, 34, 132; D1-Exs. 14-3, 19-24.

Commission investigator Tena Friery ("Friery") testified concerning the performance record of Miller's customers based upon an analysis she made of Siegel's trading records. Tr.-1 at 167-176. Her analysis revealed that from January 1, 1984, to July 31, 1989, nearly 80 percent of Miller's customers lost money trading options.[2] D1-Ex. 11. In addition, Friery provided evidence regarding trading losses incurred by Miller's customers and the commissions derived from Miller's trades during that period. D1-Ex. 21.

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[2] Although this period overlaps, it does not coincide with the relevant period of the complaint. Comparable customer percentage loss figures for the relevant years for which data was available are: 1987 (65 percent); 1988 (68 percent); 1989 (79.5 percent). D1-Ex. 11.

Miller's defense consisted of his own testimony and that of his assistant, Jennifer Nicole Martin ("Martin"), at Siegel. Miller denied that he told customers they could double or triple their money or that he guaranteed they would profit. Tr.-1 at 302. He also claimed that he informed his customers that more than 80 percent of all commodity speculators lose money. Tr.-1 at 304-306. Martin testified that Miller explained all risks, commissions, and other relevant factors to his customers. Tr.-1 at 274-83.

3. The Initial Decision

In his initial decision, the ALJ found that, while the customers testified honestly, Miller's testimony was unreliable and evasive, and Martin's testimony lacked credibility. *In re Miller*, [1992-1994 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 26,084 at 41,598 (ALJ May 25, 1994). He further found that Miller: fraudulently induced customers to invest in commodity options by making false, deceptive or misleading statements of material fact and by failing to disclose material facts to potential customers; knowingly concealed the truth from his potential customers to induce them to purchase commodity options; deliberately misled customers as to reasonable expectations of profit on commodity options; had no basis in fact for the recommendations he made to customers; had one objective in mind, to induce the customers to open an account and trade, thus making a commission for Miller; and used such phrases as a "no miss proposition" and "a sure thing" and assurances that customers would triple their investment to lead customers to believe that there was negligible risk in investing in these instruments. *Id.* The ALJ also found that when

Miller solicited his customers he knew that nearly 80% of his customers lost money and that none of his customers tripled their investment. *Id.* In light of Miller's conduct, the ALJ found it unsurprising that during 1987 and 1988 alone Miller made in excess of $1,000,000 in commission income while his customers lost $887,000.[3] *Id.* The ALJ concluded that "Miller engaged in a scheme to cheat and defraud customers and to make large commission profits at the expense of his customers. Miller proved to be an expert not on how to invest in commodity options, but rather in how to deceive and defraud customers for his own benefit." *Id.*

Based on these findings, the ALJ held that Miller violated Section 4c(b) of the Act and Commission Rule 33.10 by fraudulently inducing customers to invest in commodity options. *Id.* As sanctions, the ALJ ordered Miller to cease and desist from further violations, revoked his registration as an AP, issued a permanent trading prohibition, and imposed a civil monetary penalty of $200,000. *Id.*

4. The First Appeal

Both sides appealed the Initial Decision. In addition to challenging the ALJ's liability analysis, Miller argued that the sanctions imposed by the ALJ were unwarranted and excessive. Resp. App. Br. at 42-45. The Division defended the ALJ's liability analysis and the nonmonetary portion of

[3] These figures are derived from the trading records analyzed by Friery. Based on her testimony and analysis, the ALJ found that Miller's customers lost $448,850 in 1987 and $438,242 in 1988, while Miller received commissions of $447,185 in 1987 and $538,586 in 1988. *Miller*, ¶ 26,084 at 41,598.

the sanctions. Concerning the civil monetary penalty, however, the Division argued that the ALJ's civil monetary penalty analysis failed to consider either the financial benefit that Miller derived from his wrongdoing or the losses that his customers suffered. It urged us to vacate the ALJ's civil monetary penalty and instead to impose one of at least $1,200,000, the amount of commission income that the Division asserted Miller earned from January 1987 to July 1989. Div. App. Br. at 10-12; DOE Ex. 21; Tr.-1 at 175-176.

On June 16, 1995, we affirmed the ALJ's liability analysis and all of the sanctions except the civil monetary penalty.[4] *Miller,* ¶ 26,440. We explained that, at the time the complaint was issued, Section 6(d) of the Act provided that if a civil monetary penalty were to be imposed it was required to be based on the gravity of the respondent's violations with consideration for his net worth. *Id.* at 42,912. As the ALJ did not follow the procedures established by Commission precedent to develop the record on these issues, we found that a civil monetary penalty could not be imposed on the existing record, vacated the ALJ's civil monetary penalty, and remanded the matter to the ALJ for further proceedings.[5] *Id.* at 42,913-42,914.

In remanding the matter, we instructed the ALJ to: (1) assess the gravity of Miller's violations including any factors that aggravated or mitigated his conduct; (2) consider the

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[4] The cease and desist order and the registration revocation were affirmed without discussion. We imposed a permanent trading prohibition only after making an independent assessment of the record.

[5] We also criticized the imposition, without explanation, of a civil monetary penalty of only one-quarter of the financial benefits obtained by Miller and losses suffered by his customers. *Id.* at 42,913.

appropriateness of any penalty in light of Miller's net worth; (3) look to Commission-approved penalties in analogous cases, and if there were no analogous cases, use as a starting point either the financial benefit that accrued to respondent or the losses suffered by his customers as the result of his wrongdoing; and (4) develop the record and determine an appropriate civil monetary penalty in accordance with Commission precedents such as *In re Gordon*, [1992-1994 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 25,667 (CFTC Mar. 16, 1993), and *In re Murlas*, [1987-1990 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 24,440 (CFTC Mar. 16, 1993).[6] *Miller*, ¶ 26,440 at 42,912-42,193 and n.5.

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[6] In *Gordon*, we found that the ALJ's imposition of a $1,000 civil monetary penalty bore no relationship to the level of fraud established on the record, the financial benefit accruing to the respondent, or the losses suffered by his customers due to his wrongdoing. *Gordon*, ¶ 25,667 at 40,181. Thus, we remanded the matter to the ALJ for further proceedings on the imposition of a civil monetary penalty under the following guidelines: a civil monetary penalty ordinarily should not exceed a respondent's net worth, but should be sufficient to deter future violations by making it financially beneficial to comply with the Act and Commission Rules; the ALJ shall consider the entire record to assess the gravity of the violations; and the ALJ shall base the civil monetary penalty either "on the financial benefit that accrued to Gordon (*i.e.*, his commissions) or the losses suffered by his customers as the result of his wrongdoing, or in the alternative, specifically explain why such a basis is impractical or inappropriate." *Id.* at 40,182.

In *Murlas*, we remanded the matter to the ALJ for further proceedings on the imposition of a civil monetary penalty and explained that: as respondents generally control the information directly probative of their financial condition, the respondent has the initial burden to proffer information concerning his financial status; if the Division accepts the respondent's proffer as valid, there is no need for further proceedings on this issue; if the Division disputes respondent's net worth proffer, however, the Division may discover material financial

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5. The Net Worth Hearing

Both the Division and Miller requested a hearing concerning the civil monetary penalty. On August 17, 1995, the ALJ scheduled the hearing for December 12, 1995. The hearing was later rescheduled to January 1996 at Miller's request. Also, in August 1995, the Division requested, and the ALJ issued, a subpoena to Miller ordering him to bring all his financial records to the hearing, including tax returns from 1987 to 1994, check registers, materials relating to indebtedness, and other records relating to his ability to pay a civil monetary penalty. The Division also subpoenaed financial records from Miller's current employer, Star Commodities, Ltd. ("Star"), and from Siegel. The hearing was held on January 25-26, 1996.

At the hearing, Miller submitted only partial tax records and failed to produce most of the financial records that were required under the subpoena such as check registers and records of expenditures. Net Worth Hearing Transcript ("Tr.-2") at 10-12, 22, 23, 27-32, 34, 88, 100; Division Exhibits ("D2-Ex.") 1, 4-10. He provided no documentation concerning his liabilities other than a handwritten list of debts that he claimed he owed to various financial institutions. Respondent Exhibit ("R2-Ex.") 3. The Division questioned Miller regarding his income and assets from 1987 until the hearing date, including his purported disposition of significant assets, *i.e.*, his residence and his half ownership in M&B Trading Company ("M&B). Tr.-2 at 16-50, 54, 56-62, 90-95.

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information from respondent and a hearing will be convened into the matter. *Murlas* ¶ 24,440 at 35,930-35,931 and n.8.

Miller presented the testimony of two former customers. One of the customers traded with Miller only after the period in question. Tr.-2 at. 81. The other customer's testimony was presented through a stipulation of expected testimony. The stipulation stated that the customer had traded with Miller during an unspecified time at Siegel and at Star. Tr.-2 at 110. Both customers believed that they had not been defrauded by Miller. Tr.-2 at 77-82, 110.

In its post-hearing brief, the Division provided estimates with respect to customer loss, Miller's commission income, and his net worth. The Division estimated that between January 1, 1987 and July 31, 1989, Miller's customers lost $1,350,623. Division Brief in Support of Proposed Findings of Fact and Conclusions of Law and in Support of Civil Monetary Penalty (Apr. 16, 1996) at 11 ("Division Post Hearing Br.").[7] Next, the Division estimated Miller's commission income from Siegel for the years 1988 through 1991 to total $637,771.91.[8] Division

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[7] This figure was derived from the evidence introduced at the first hearing in connection with Commission investigator Friery's testimony. *See* D-1 Ex. 21. The Division's arithmetic is apparently in error – the correct aggregate loss appears to be $1,351,623. This figure reflects losses of $448,850, $438,242, and $464,531 for the years 1987, 1988, and part of 1989, respectively. This total underestimates the aggregate customer loss, as it does not reflect losses for 1990, 1991, and the last five months of 1989. The Division had no information on customer losses for those years.

[8] The amount of commissions reflected here is different from that provided by the Division at the first hearing. The Division's earlier figures were derived from Siegel documents reflecting commissions paid on accounts managed by Miller. The figure reflected here was derived from Miller's IRS Forms 1099 for 1988-1991 provided by Siegel, which indicated that Miller received income of $217,518.66, $143,732.25, $210,366, and $65,903.03 from Siegel for the years 1988, 1989, 1990, and 1991, respectively. As with the aggregate customer loss total, this figure underestimates Miller's total benefit, because no information was

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Post Hearing Br. at 12-13; D2-Ex. 2. Finally, based on the evidence presented at the hearing, the Division estimated Miller's net worth to be at least $1,037,137, exclusive of his residence. Division Post Hearing Br. at 17, 20.[9] Citing Miller's failure to provide complete and accurate financial information in response to its subpoenas and his failure to provide honest statements regarding his financial condition, the Division argued that Miller had forfeited his right to have his net worth considered in assessing a civil monetary penalty. *Id.* at 14. It therefore urged the ALJ to assess a penalty based solely on the extreme gravity of Miller's violations, which it argued should be based on all of the losses by Miller's customers during the period of his wrongdoing ($1,350,623). *Id.* at 19, 24. Alternatively, the Division argued that the civil monetary penalty should be based on the benefits *i.e.*, commissions) received by Miller from his wrongdoing ($637,000), which it said was appropriate in light of Miller's net worth as calculated by the Division ($1,037,137). *Id.* at 20-21.

By contrast, Miller maintained that his violations were not sufficiently grave to warrant a civil monetary penalty. Miller's Posthearing Brief and Proposed Findings

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provided for the 1987 tax year. Again, the Division's math is apparently in error – the correct total appears to be $637,519.94. However, we do not consider these differences in the calculation of commissions or losses to be material to our decision on penalties.

[9] This estimate is based on funds in Miller's savings account and pension plan, a settlement he received from Siegel, and his interest in M&B. The estimate considers only assets, not liabilities. The Division justified excluding Miller's liabilities from consideration on the basis of Miller's failure to provide any documentation of his liabilities. Div. Br. at 17.

of Fact and Conclusions of Law (May 16, 1996) at 7-15 ("Resp. Post Hearing Br."). Miller further asserted that: (i) any civil penalty would be inappropriate, as he already had been penalized sufficiently through the other sanctions imposed, *id.* at 4, 28; (ii) the other sanctions had effectively deterred him and others from future wrongdoing, *id.* at 4; (iii) he sufficiently demonstrated at the hearing that he had little ability, if any, to pay a civil monetary penalty, *id.* at 15-20 (citing Tr.-2 at 104-107); (iv) he had submitted evidence which showed that his net worth was actually negative, *id.* at 17 (citing D2-Exs. 1 and 11; R2-Exs. 1 and 3); (v) he had complied with the Division's subpoena by providing the documents he "had in his possession, custody and control," and had never refused to produce a requested document, *id.* at 19; and (vi) if a civil monetary penalty were imposed, it should be based solely on the losses suffered by the seven witnesses who testified at the hearing below, *id.* at 6.

6. The Initial Decision on Remand

The ALJ's initial decision on remand reduced Miller's civil monetary penalty from $200,000 to $50,000. *In re Miller*, [1994-1996 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 26,722 (ALJ June 21, 1996). The ALJ first addressed the gravity of Miller's offenses. Noting that the gravity of Miller's violations had been established in the first initial decision, the ALJ reiterated that Miller had "intentionally engaged in a scheme to cheat and defraud his customers for the purpose of gaining large commissions," a violation of the core provisions of the Act warranting serious sanctions. *Id.* at 43,994-43,995. He emphasized that Miller "should not be permitted to financially benefit from his wrongdoing," and therefore, it was

necessary to impose a civil monetary penalty. *Id.* at 43,994.

Addressing the financial benefit that Miller derived from his wrongdoing, the ALJ rejected the Division's view that it should be based on Miller's earnings at Siegel on the ground that the Division had "failed to show a direct correlation between Miller's fraudulent acts and the commissions he gained." *Id.* at 43,995. The ALJ similarly rejected the Division's argument that the amount of customer harm (which the Division estimated at $1.35 million) was at least equal to all losing trades made through Miller from 1987 to 1989. By contrast, the ALJ accepted Miller's argument that the relevant harm should be limited to the losses suffered by the seven customers who testified at the first hearing and held Miller responsible only for those losses, which the ALJ estimated to total $100,000. *Id.*

Turning to Miller's net worth, the ALJ did not address Miller's failure to produce a substantial portion of the documents requested under the subpoena, simply stating that "[n]umerous financial documents were produced at the hearing in an attempt to determine Miller's net worth." *Id.* at 43,996. The ALJ rejected the Division's contention that Miller's net worth should be based on the total commission income he earned during the period alleged in the Complaint, concluding that such an assessment was not supported by financial records. *Id.* The ALJ also rejected Miller's claim that his net worth was negative. *Id.* Stating that the evidence presented at the hearing indicated that Miller's assets had declined since the period charged in the complaint and that the revocation of Miller's registration and the imposition of a trading ban reduced Miller's earning power, the ALJ set Miller's net

worth at "approximately $50,000." *Id.* The ALJ did not explain how he had arrived at this amount, stating only that evidence and testimony presented by both parties led to this conclusion. *Id.* The ALJ then imposed a civil monetary penalty of $50,000. *Id.*

7. The Second Appeal

Only Miller appeals the ALJ's initial decision on remand. The sole issue on appeal is the appropriateness of the $50,000 civil monetary penalty imposed by the ALJ in his initial decision on remand.[10] Miller does not challenge the ALJ's net worth determination, but argues that the imposition of a $50,000 civil monetary penalty constitutes "prejudicial and reversible error" because it "would deprive him of any asset that he may have to live on." Resp. Br. at 4, 6. He maintains that a monetary penalty in an amount equal to his net worth "is unduly excessive and inconsistent with Commission precedent." *Id.* at 4. Finally, Miller asserts that his assets are "insufficient" to satisfy the ALJ's civil penalty. Resp. Br. at 19.

[10] Although the propriety of the ALJ's liability analysis and the nonmonetary sanctions imposed were addressed in the Commission's previous decision, Miller's appeal brief contends that the gravity of his conduct does not warrant the sanctions imposed by the ALJ and challenges the appropriateness of the trading ban and the revocation of his registration. *See* Brief of Respondent Howard Miller in Support of His Appeal to the CFTC ("Resp. Br.") at 3 n.4, 6 n.5, 9-18. As these issues were resolved in the first appeal to the Commission, they may not be relitigated.

## DISCUSSION

We review the imposition of sanctions *de novo*[11] *In re Grossfeld*, [Current Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 26,921 at 44,467 (CFTC Dec. 10, 1996). Our analysis focuses on what the appropriate sanctions are in a given case in light of the facts and circumstances, not on the quality of the ALJ's assessment. *Id.*

In enforcement proceedings we impose sanctions "to further the Act's remedial policies and to deter others in the industry from committing similar violations." *In re Volume Investors Corp.*, [1990-1992 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 25,234 at 38,679 (CFTC Feb. 10, 1992). We do not rely on a specific formula to determine the appropriate level of a civil monetary penalty. *Grossfeld*, ¶ 26,921 at 44,467. Instead, we look to the total facts and circumstances of the case and focus on the relative gravity of the respondent's misconduct. *Id.*

To determine the gravity of the respondent's misconduct, we consider a number of factors. First, we consider the relationship of the violation to the regulatory purposes of the Act. *Id.* Conduct which violates core provisions of the Act, *e.g.*, defrauding customers, is very grave even if there are mitigating circumstances. *Id.* at 44,468 and n.28; *In re Premex*, [1987-1990 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 24,165 at 34,890 (CFTC Feb. 17, 1988).

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[11] The ALJ's analysis concerning the civil monetary penalty in this case does not reflect a reasoned application of the factors our precedent has identified as relevant to this assessment. Thus, even if we applied a general rule of deference to the ALJ's imposition of sanctions, we would not defer to the ALJ's civil monetary penalty assessment in this case. See *Miller*, ¶ 26,440 at 42,912; *In re Sigler*, [1990-1992 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 24,978 at 37,578 (CFTC Jan. 8, 1991).

Second, we consider the respondent's state of mind to determine whether the violations were knowing or unintentional, widespread and continuous or isolated. *Grossfeld*, ¶ 26,921 at 44,467 and n.29; *Premex*, ¶ 24,165 at 34,891. Third, we consider the respondent's post-violation conduct, including whether he cooperated with the authorities and whether he attempted to cure the violations and provide restitution. *Grossfeld*, ¶ 26,921 at 44,468 and n.31; *Premex*, ¶ 24,165 at 34,891. Fourth, we consider the consequences flowing from the violative conduct, including the benefits to the respondent (his commissions) and the losses to customers. *Grossfeld*, ¶ 26,921 at 44,468 and n.30; *Gordon*, ¶ 25,667 at 40,182; *Premex*, ¶ 24,165 at 34,891. In fraudulent solicitation cases, such as this, the amount of a civil monetary penalty is based on these amounts, with adjustments up or down in light of the other factors addressed here. *Gordon*, ¶ 25,667 at 40,182. Finally, as the enforcement action in this case was filed before October 29, 1992, the effective date of the Futures Trading Practices Act of 1992, P.L. 102-546 ("FTPA"), unless the respondent waives his right to have his net worth considered under former Section 6(d) of the Act, 7 U.S.C. § 9a (1992), we also must consider his net worth before imposing a civil monetary penalty. *Grossfeld*, ¶ 26,921 at 44,466; *Murlas*, ¶ 24,440 at 35,930 and n.11; *In re Nelson Ghun*, [1984-1986 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 22,584 at 30,525 and n.2 (CFTC May 2, 1985); *In re Rothlin*, [1982-1984 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 21,851 at 27,574 (CFTC Dec. 21, 1981).

As Miller's misconduct involved fraudulently inducing his customers to trade in commodity options, it violated a core provision of the Act. His misconduct was certainly

serious. As we stated below, the record establishes that Miller engaged in a pattern of wrongdoing that extended over several years. *Miller*, ¶ 26,440 at 42,914. In addition, his misrepresentations, which included guaranteeing profits, promising wildly exaggerated returns, minimizing risks, and misrepresenting his experience and record, were egregious. *See id.* at 42,914 and n.1. The record also establishes that Miller's misconduct was widespread and continuous. The witnesses presented by the Division testified that they did not invest with Miller until they received repeated cold calls from him. Tr.-1 at 11-13, 84-85, 147, and 234. There is no basis to conclude that Miller acted differently with the numerous other customers whom he solicited at Siegel.[12] Based on these facts we conclude that Miller's misconduct was intentional, widespread and continuous.

There is no evidence that Miller was cooperative with the authorities or has attempted to cure his violations and provide restitution to his customers. In fact, Miller was evasive and deceptive at both hearings and has not made any attempt to provide restitution. Rather than being a mitigating factor, his post-violation conduct aggravates his misconduct.

Miller profited substantially from his misconduct. From 1988 through 1991, according to his IRS Forms

[12] The stipulation introduced by Miller of expected testimony of a single customer he traded for at an unspecified time at Siegel is insufficient to overcome the overwhelming evidence of Miller's widespread and pervasive fraudulent solicitation practices at Siegel. The testimony by one of Miller's customers at Star is irrelevant to this proceeding. The issue here is limited to Miller's fraudulent solicitation practices at Siegel and any civil monetary penalty which should be imposed due to those practices.

1099, Miller received $637,519.94 in commissions from Siegel. D2-Ex. 2. Miller's gains from his wrongdoing were even greater than this figure. Miller's commission income for 1987 is not included, as no information was available for that year.

Miller's customers suffered significant losses due to Miller's misconduct. From January 1, 1987 through July 31, 1989, Miller's customers suffered $1,351,623 in out-of-pocket losses. *See* D1-Ex. 21. This figure seriously underestimates the losses suffered by Miller's customers, as it does not include their losses for 1990 through 1991 and the last five months of 1989.[13]

The final factor in this analysis is Miller's net worth. The Section 6(d) net worth determination is intended to protect respondents from the imposition of excessive monetary penalties in relation to their financial resources. *Murlas*, ¶ 24,440 at 35,930; *In re Rothlin*, [1982-1984 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 21,851 at 27,573 (CFTC Dec. 21, 1981). Once a respondent is aware that his net worth is likely to be a material issue in an enforcement proceeding, he has the burden to invoke Section 6(d) of the Act and then to demonstrate the level of civil penalty that would be excessive in light of his

[13] It is appropriate to find that a substantial portion of the customers' losses was due to Miller's misconduct. Miller's fraudulent solicitation appeared fairly standard and consistent with regard to each of the testifying customers and clearly played a significant role in convincing his customers to expose themselves to the risks of the commodities markets. *See In re Gordon*, [1994-1996 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 26,326 at 42,592 (CFTC Mar. 6, 1995). In addition, the customer loss figure is very conservative as it does not include the losses incurred during a significant period of Miller's misconduct. *See Grossfeld*, ¶ 26,921 at 44,470 and n.41.

financial circumstances. *Grossfeld*, ¶ 26,921 at 44,465-44,466; *Murlas*, ¶ 24,440 at 35,930; *Rothlin*, ¶ 21,851 at 27,573. The burden of production for this purpose rests with the respondent because he generally controls the information or records directly probative of his financial condition. *Grossfeld*, ¶ 26,921 at 44,466; *Murlas*, ¶ 24,440 at 35,930-35,931; *Rothlin*, ¶ 21,851 at 27,573. If the Division disagrees with the respondent's net worth showing, it then has the right to discover financial information from the respondent and to a hearing to ensure development of an adequate record on net worth. *Grossfeld*, ¶ 26,921 at 44,466; *Murlas*, ¶ 24,440 at 35,930-35,931.[14] Failure of the respondent to cooperate in this process is considered a waiver of the opportunity available under Section 6(d). *Grossfeld*, ¶ 26,921 at 44,466; *Murlas*, ¶ 24,440 at 35,930; *Nelson Ghun*, ¶ 22,584 at 30,525 and n.2; *Rothlin*, ¶ 21,851 at 27,573.

Miller was on notice that his financial condition was at issue long before the net worth hearing in January 1996. In his initial appeal with the Commission, filed on July 7, 1994, Miller asserted that the ALJ erred by not holding a net worth hearing. Resp. App. Br. at 45. Miller again raised this issue in his Answer to the Division's Appeal, filed on August 15, 1994. Respondent's Answering Brief at 18. On August 7, 1995, Miller formally requested a net worth hearing. Also in August 1995, the Division subpoenaed Miller, requiring him to produce at the hearing, among other things, all of his individual income tax returns and related documents for 1987 through 1994, all documents in his possession, custody or control relating to

[14] To the extent practicable, the net worth finding is based on evidence at the time of the hearing. *Murlas*, ¶ 24,440 at 35,933 n.14.

bank and retirement accounts, investments, pensions, insurance, promissory notes, debts owed to or by him, and transfers of property or assets. On August 17, 1995, the ALJ scheduled the hearing for December 12, 1995. The hearing was later rescheduled to January 1996 at Miller's request. The Division issued an identical subpoena requiring the documents to be produced on the new hearing date.

At the net worth hearing, Miller produced hardly any financial records, despite having been subpoenaed twice by the Division, having had more than four months to gather the documents, and having known that the purpose of the hearing was to determine his ability to pay a civil monetary penalty. Tr.-2 at 23, 32. On the first day of the hearing, Miller showed up without *any* of his personal tax records. When asked why, Miller simply stated, "I did not bring any of my personal tax returns, because my accountant had been out of town and I wasn't able to get any copies of it (sic)." Tr.-2 at 11. Even when Miller produced some income tax returns the next day after requesting them from his accountant, he did not provide tax returns for 1987, 1988, or 1989. He also failed to produce any records showing his income for 1995. Miller did not produce any banking, retirement account, investment, pension, insurance, or debt documents. Miller asserted that he did not produce any personal checks or check registers because he does not keep them. Tr.-2 at 30.

Furthermore, the documentation provided by Miller was contradictory and unreliable. While on a Financial Statement of Debtor Form ("Debtor Form") submitted by Miller to the Commission to support a proposed settlement agreement, Miller claimed income in 1994 of $9,820, his tax return for that year reveals income of $90,251. D2-Exs. 10 and 11. Also in his Debtor Form, Miller claims income

of $23,000 for 1992, D2-Ex. 11, but does not disclose that he received $309,670 from his pension plans that year, D2-Ex. 8. Miller's claim that his interest in his personal residence and other assets was transferred to his wife and children on February 1, 1993, after the complaint was filed in this case, is substantiated only by an unwitnessed, handwritten note. R2-Ex. 2. This note is contradicted by Miller's testimony that he continues to live in and pay the mortgage and association fees on the residence. Tr.-2 at 28, 30, 31, 36-37. Miller's claim that he sold his 50 percent interest in M&B is contradicted by the very document that he produced to substantiate it. Miller testified that he sold his interest in M&B to his partner Allen Bader and submitted R2-Ex. 2 to substantiate this claim. This document, however, does not address a sale or transfer of Miller's interest in M&B. Finally, Miller's only submission concerning his liabilities was a handwritten sheet listing amounts he allegedly owed on bank loans and credit cards. R2-Ex. 3.

In sum, we find that Miller waived his right to have his net worth considered in determining an appropriate civil monetary penalty. He was fully informed both that he was facing a civil monetary penalty and of the procedure which would be followed under our precedent and Section 6(d) of the Act. *See Rothlin* ¶21,851 at 27574. Miller's failure to cooperate by producing the requested documents and to make the showing contemplated by Section 6(d) constituted a waiver of his right to have his net worth considered. Even if Miller had not waived his right to have

his net worth considered, we find that his net worth exceeds $600,000.[15]

In light of all of the factors addressed above, we assess a civil monetary penalty of $600,000 against Miller.

## CONCLUSION

The ALJ's decision imposing a $50,000 civil monetary penalty is vacated. The $600,000 civil monetary penalty, cease and desist order, permanent trading prohibition, and revocation of Miller's registration as an associated person shall become effective 30 days from the date this order is served.[16]

IT IS SO ORDERED.

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[15] Miller's income from 1988 through 1994 totals more than $1.2 million. D2-Exs. 2, 4-11. Miller's income from 1987 and 1995 should be considered, but Miller failed to provide any information concerning those years. We infer from Miller's failure to provide income information for those years that the missing information would be harmful to Miller's cause. *See Rothlin* if 21,851 at 27573. Additionally, his assets include $120,000 in his home (a $70,000 down payment plus $50,000 in increased property value), D2-Ex. 11 and Tr.-2 at 36; a $62,500 settlement from Siegel, Tr.-2 at 44; $2,000 cash value in life insurance, D2-Ex. 1; $36,000 from Allen Bader, R2-Ex. 2, Tr. at 37, 53; social security payments of $12,000 per year, D2-Ex. 11; and his 50 percent interest in M&B. Even assuming R2-Ex. 3 accurately reflects Miller's liabilities, his liabilities total far less than $100,000. Accordingly, his net worth likely exceeds $600,000.

[16] A motion to stay the effect of this decision pending reconsideration by the Commission or notice of appeal seeking review by the relevant United States Court of Appeals must be filed within 15 days of the date this order is served. *See* Section 6(c) of the Act, 7 U.S.C. § 9 (1994) and Commission Rule 10.106, 17 C.F.R. § 10.106 (1997).

By the Commission (Chairperson BORN, Commissioners TULL, HOLUM and SPEARS).

/s/ Catherine D. Dixon
Catherine D. Dixon
Assistant Secretary of
the Commission
Commodity Futures
Trading Commission

Dated: March 12, 1998

**UNITED STATES OF AMERICA**
**Before the**
**COMMODITY FUTURES TRADING COMMISSION**

| | | |
|---|---|---|
| **In the matter of** | ) | |
| | ) | |
| **HOWARD MILLER** | ) | **CFTC Docket No. 92-4** |
| | ) | |
| **Respondent.** | ) | |

Appearances:

Jennifer Larabee, Esq., Los Angeles, California, for the Commodity Futures Trading Commission, Division of Enforcement;

Robert E. Thompson, Esq., San Francisco, California, for Respondent.

Before:

Painter, Administrative Law Judge

## INITIAL DECISION

(Filed Jun. 21, 1996)

### Procedural History

On November 13, 1991, the Commission issued its Complaint against Respondent Miller ("Miller") alleging that from January 1987 through April 1991, while an associated person of Siegel, Miller fraudulently solicited customers in violation of Section 4c(b) of the Commodity Exchange Act ("Act") and Commission Regulation 17 CFR 33.10 ("Regulation"). The Complaint asserted that Miller had made material misrepresentations in connection with trading commodity options, the risks involved in trading,

and the experience and performance record of both himself and Siegel.

On May 25, 1994, this Court filed its Initial Decision, finding that Miller had violated the Act and regulations as charged in the Complaint. As sanctions, this Court revoked Miller's registration as an associated person, imposed a cease and desist order, a permanent trading prohibition, and a civil monetary penalty of $200,000.

Both parties appealed the Initial Decision to the Commission. On June 16, 1995 the Commission issued its Opinion and Order, adopting the findings and analysis of liability of the Initial Decision and affirming all of the sanctions except the civil monetary penalty. *In re Miller,* [Current Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 26,440 at 42,911 (CFTC June 16, 1995).

The Commission found that this Court had failed to articulate how the amount of the civil monetary penalty was calculated in accordance with the decision. *In re Gordon,* [1992-1994 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 25,667 (CFTC Mar. 16, 1993). The Commission remanded the case to this Court with instructions to reassess the amount of the civil monetary penalty to be imposed upon Miller.

A hearing concerning this matter was held on January 25 and 26, 1996, whereby this decision follows.

## Discussion

The Commission set forth a process for determining the appropriate amount of civil monetary penalties to be imposed for violations of the Act or regulations in *In re Gordon* [1992-1994 Transfer Binder] Comm. Fut. L. Rep.

(CCH) ¶ 25,667 (CFTC Mar. 16, 1993). According to the process, the "seriousness" of a violation is determined by considering the "general gravity of the offense as mitigated or aggravated by circumstances of the case at hand." *In re Gordon* [Current Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 26,326 at 42,592 (CFTC March 6, 1995) (citing *In re Premex,* [1987-1990 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 24,165 at 34,888 (CFTC Feb. 17, 1988)). The gravity of the offense may be determined by weighing either the benefits derived by the respondent, or losses suffered by the customers, against the respondent's net worth.[1] This suggests that the monetary success or failure of a respondent who violates the Act essentially determines the gravity of the offense.

*Gravity of the offense*

The gravity of respondent Miller's offenses has been previously established. *See In re Miller* [1992-1994 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 26,084 (CFTC May 25, 1994). The Court finds that Miller intentionally engaged in a scheme to cheat and defraud his customers for the purpose of gaining large commissions. *Id.* at

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[1] At the time the Complaint in this matter was filed, Section 6(d) of the Act required the Commission to consider: 1) the gravity of respondent's violations *and* 2) the appropriateness of the penalty to the size of respondent's business and ability to continue in business *or* 3) the appropriateness of the penalty to respondent's net worth. Congress has amended Section 6(d) (and redesignated it as Section 6(e)) to remove the Commission's legal obligation to look beyond the gravity of respondent's violations. *See* The Futures Trading Practices Act of 1992, Pub. L. No. 102-546, 106 Stat. 3590 (1992).

It is unnecessary to consider step 2 in this case because Miller's registration has been revoked.

41,598. Miller should not be permitted to financially benefit from his wrongdoing. In accord with the guidelines laid down by the Commission, it is necessary to assess a monetary penalty against Miller.

*Benefit to Miller*

In *Gordon,* the Commission held that the civil money penalty should be based on the financial benefit that accrued to the respondent or the losses suffered by his customers as the result of the violations, or in the alternative, specifically explain why such a basis is impractical or inappropriate. *Gordon,* ¶ 25,667 at 40,182.[2]

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[2] The application of a strict mathematical formula to determine the gravity of an offense, and the imposition of civil penalties based on benefits derived by the respondent or losses incurred by the customers, may result in incongruous sanctions. Consider the following: Broker A "guarantees" that if the customer buys sugar options, he will double his investment in 30 days. Broker B "guarantees" that if the customer buys coffee options, he will double his money in 30 days. Sugar goes up 5 cents a pound, and Broker A's customers more than double their investment. Coffee does not move, and all of Broker B's customers lose. In each scenario, the violation, i.e., the guarantee, is extremely grave. Any civil monetary penalty should be roughly the same as to A and B. Penalties should be based upon the seriousness (or gravity) of the violation, and not the vagaries of the market place.

To effectively ensure compliance with the Act and regulations, the size of a penalty should have relevance to the seriousness with which the Commission views the violation of a particular provision of the Act, and not the ultimate result of violations coupled with other non-violative events. A "results" formula may cause a minimal penalty for the most egregious violation if the violation fails to produce benefits for the wrongdoer or results in no losses to the customers. The most trivial violation may, when coupled with other factors, such as war, drought and the like, result in massive losses to customers, and hence a huge monetary penalty.

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The Division asserts that Miller gained substantial commissions from his fraud. The Division argues that from at least 1988 through 1991, Miller made commissions estimated at $637,771.90. [DOE EX 2].

The Division, however, has failed to show a direct correlation between Miller's fraudulent acts and the commissions he gained. *See Premex,* ¶ 24,165 at 34,890.[3] It is not in dispute that Miller's intentional fraud upon the customers who testified violates the core provisions of the Act, and warrants serious sanctions. *See Premex,* ¶ 24,165 at 34,890. In assessing the penalty to be imposed on Miller, however, this Court shall follow the process laid out by the Commission in *Gordon.*

*Losses to the Customers*

The Division argues that the losses to the customers exceed the amount of $1.35 million. [TR-1 DOE EX 21]. This amount was determined by looking to all losing trades made through Miller for the period of January 1, 1987 through July 31, 1989. [TR-1 DOE EX 21]. Such an

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It would appear that by basing the size of the civil monetary penalty on the amount of financial gains of the respondent the Commission has actually adopted a theory of disgorgement. The difficulty lies in the fact that disgorgement does not reflect the seriousness of the violation. Due to market fluctuations in commodity trading, unlawful advice to a customer can be profitable, while honest advice may result in losses. The focus on the amount of money affected by the transactions detracts from the greater concern, which is the nature and gravity of the violation.

[3] The Court recognizes the difficult burden the Division has in showing how financial gains to respondent or losses to customers are a direct result of violations. However, to merely assume, without more, that every dollar lost or gained was a consequence of respondent's fraud would be a great leap into speculation.

analysis is inappropriate when all of the losses cannot reasonably be attributed to Miller's fraudulent acts. The Division has thus failed to clearly establish the amount of customer losses caused by Miller's unlawful conduct.

Miller argues that the losses should be limited to the losses suffered by the seven customers who appeared and gave testimony. This is a reasonable argument. Unfortunately for Miller, it appears that the Commission presumes all losses sustained by the customers of a charged respondent are due wholly to the wrongdoing of the respondent. Presumably, then, if a customer of the respondent takes every position diametrically opposed to the advice of the salesman, his losses are still due to the "wrongdoing" of the respondent. Such a broad assumption does not hold weight in a market where there is inevitably going to be one losing trade for every winning trade. In this case, however, the Court does not find the Division met its burden in showing all customer losses are reasonably attributed to Miller's conduct.

The seven witnesses do, however, provide this Court with a starting point in determining customer losses. Based on the credible testimony of the witnesses and the evidence of their losses caused by Miller's fraudulent conduct, the Division has established that Miller was responsible for, at least, the losses accrued by those customers who testified. Therefore, the Court finds that Miller's violations resulted in approximately $100,000 in customer losses. [TR-1, pgs. 19, 70, 96, 247; DOE EX 19, pg. 4, RES EX 4, pgs. 7, 13, 17, 24].

The next consideration for assessing a proper civil monetary penalty is the appropriateness of the penalty to respondent's net worth.

*Net Worth*

A civil monetary penalty should not exceed respondent's net worth. *Gordon* ¶ 25,668 at 40,182. Numerous financial documents were produced at the hearing in an attempt to determine Miller's net worth: federal, personal and business tax returns; a signed Financial Statement of Debtor Form; and various other documents establishing other sources of income. [DOE EX 1-11; RES EX 1-3]. The documents were used to evaluate Miller's total assets compared to his total liabilities.

The Division of Enforcement asserts Miller's net worth to be a minimum of $637,771.91. [DOE EX 2]. This amount is claimed to be the total of commissions earned by Miller during the period alleged in the Complaint. A review of Miller's financial documents, however, does not support this assessment.

Miller, on the other hand, argues that he in fact has a negative net worth and could not pay a civil monetary penalty. [DOE EX 1, 11 ; RES EX 1, 3]. The Court does not find this to be the case.

The evidence presented at the hearing in this matter, indicated that the assets of Miller have declined from the period charged in the Complaint. In addition, with the revocation of his registration and the trading ban, Miller now has little earning power. In light of the evidence presented by the Division and Miller, along with the testimony, this Court concludes Miller's net worth to be approximately $50,000. The Court thereby imposes upon Miller a civil monetary penalty of $50,000.

**ORDER**

**Respondent Miller** is hereby **ORDERED** to pay a **civil monetary penalty** in the amount of fifty thousand dollars ($50,000) within thirty days of the date this Order becomes final.

Dated this 21st day of June, 1996,

/s/ George H. Painter
George H. Painter
Administrative Law Judge

UNITED STATES OF AMERICA
Before the
COMMODITY FUTURES TRADING COMMISSION

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| In the Matter of | : CFTC Docket No. 92-4 |
| HOWARD MILLER | : OPINION AND ORDER |
| | : (Filed Jul. 13, 1995) |

In May 1994, an Administrative Law Judge ("ALJ") found that Howard Miller had committed fraudulent practices prohibited by Section 33.10 of the Commission's regulations. As sanctions for these violations, the ALJ revoked Miller's registration as an associated person and imposed a cease and desist order, permanent trading prohibition and $200,000 civil money penalty.

Both parties have appealed. Miller raises procedural and substantive objections to the ALJ's liability analysis. In addition, he challenges both the ALJ's imposition of a civil money penalty and trading prohibition as contrary to Commission precedent. He also contends that the ALJ erred by imposing a level of sanctions that is facially excessive. The Division of Enforcement ("Division") defends the judge's liability analysis and the bulk of the sanctions he imposed, but agrees that the judge failed to follow Commission precedent in determining the appropriate civil penalty for Miller's violations.

For the following reasons, we affirm the judge's liability analysis, revocation of Miller's registration and imposition of a cease and desist order. Based upon an independent assessment of the record, we impose a permanent trading prohibition on Miller. Finally, we vacate

the civil money penalty imposed by the judge and remand for further proceedings on issues relating to this sanction.

## BACKGROUND

In November 1991, the Commission issued a complaint alleging that Miller had violated Section 4c(b) of the Commodity Exchange Act ("Act") and Commission Rule 33.10 by fraudulently soliciting customers during the period January 1987 through April 1991. Miller was employed as an account executive by Siegel Trading Company ("Siegel"), a registered futures commission merchant, during this period. The complaint alleged that Miller's oral misrepresentations had included statements concerning: (1) the likelihood that his customers would profit by trading commodity options with him; (2) the risks in trading commodity options with him; and (3) both his own and Siegel's experience and performance record.

Following discovery, an ALJ conducted a hearing in November 1993. Seven customers testified concerning their solicitation by Miller during the period at issue.[1] The

[1] These customers testified that they had invested with Miller after repeatedly receiving cold calls from him. Tr. 11-13, 234, 84-85, 147. Some testified that Miller had persistently claimed that he could easily double or triple their money in a short period of time, and in at least one case, guaranteed profits. Tr. 84-85, 94, 141, 190. Others testified that Miller had not only claimed that he had doubled or tripled the money of other clients, but also stated (or at least implied) that he could make similar money for the customer he was soliciting. Tr. 120, 127, 236. Customers testified that Miller had used phrases such as "this is a winner," "this is a sure thing," "a sure deal," and "a no miss proposition." Tr. 19, 63, 123, 191. Customers also cited examples of Miller's misrepresentations concerning his background and experience (Miller told one customer that he had been selling options for 20 years and had a good record. Tr. 147) and the risk of options trading (Miller compared

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Division also presented the testimony of a Commission investigator who had analyzed the overall trading results of all accounts maintained at Siegel during the relevant period and those specifically handled by Miller. Miller testified in his own defense[2] and sponsored the testimony of Jennifer Nicole Martin, his assistant during the relevant period.

In his initial decision ("I.D."), the ALJ credited the testimony offered by the Division's customer witnesses, finding that they had testified "honestly." I.D. at 6. In contrast, the ALJ found that Miller was "an unreliable and evasive witness," and that the testimony offered by Miller's assistant (Jennifer Martin), "lacked credibility and was contradicted by the customer witnesses." *Id.* He adopted all the Division's proposed findings of fact, concluding that they were "fully supported by the evidence adduced." *Id.* On this basis, he concluded that Miller had violated Section 4c(b) of the Act and Commission Rule 33.10 by fraudulently inducing customers to trade in commodity options.

In assessing sanctions, the judge failed either to discuss the issues raised by the parties or offer any explanation for his choice of sanctions. He simply revoked Miller's registration as an AP, and imposed a cease and

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the returns from options to those of savings accounts or mutual funds. Tr. 240-241).

[2] Miller denied that he had ever told customers that they could double or triple their money, Tr. 302, and insisted that he always told his customers that 80 percent to 85 percent of all commodity speculators lose money. Tr. 304-305. Miller also testified that he never mentioned how his other customers' accounts were doing when he solicited customers' business. Tr. 306.

desist order, permanent trading prohibition, and $200,000 civil money penalty. I.D. at 7.

Both parties filed timely appeals.

## DISCUSSION

On appeal, respondent raises both procedural and substantive challenges to the ALJ's liability analysis. In essence, he argues that the ALJ's bias, adverse discovery rulings, and refusal to postpone the scheduled hearing deprived him of his right to a fair hearing. In addition, he challenges both the ALJ's credibility determinations and factual assessments as unsupported by the record. The Division opposes Miller's appeal, arguing that there is no evidence of either extrajudicial or pervasive bias on the part of the ALJ, that the judge did not abuse his discretion in either resolving discovery disputes or scheduling the hearing, and that Miller has not demonstrated the type of clear error that justifies an exception to the Commission's policy of deferring to the credibility determinations and factual assessments of its presiding officers.

Our review of the record and the parties' arguments on appeal persuade us that the ALJ committed no error material to his assessment of Miller's liability. Because the liability issues that Miller raises do not involve important questions of law or policy that merit extended discussion, we affirm the result of the judge's liability analysis without opinion.[3]

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[3] Because the ALJ's findings and conclusions are supported by the weight of the evidence, they shall be deemed the Commission's for purposes of review in an appropriate court. Nevertheless, the initial

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Both parties raise challenges to the ALJ's abbreviated sanctions analysis, particularly his imposition of a $200,000 civil money penalty. Respondent argues that the ALJ erred by failing to afford him the procedural protections mandated by Commission precedent. In addition, he challenges the ALJ's finding that all commissions he earned and all losses his customers suffered were the result of the fraudulent conduct established on the record. The Division argues that the ALJ ignored Commission precedent holding that the starting point for calculating a civil money penalty should be either the economic benefit to respondent or economic loss to customers arising out of respondent's wrongdoing.

As a general rule, the assessment of sanctions is entrusted to the discretion of the ALJ in the first instance, and the Commission does not substitute its judgment for the ALJ's in the absence of an abuse of discretion. *In re Sigler*, [1990-92 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 24,978 at 37,578 (CFTC Jan. 8, 1991). Instead, the Commission's review "focuses on whether the ALJ's choice of sanctions reflects a reasoned application of the factors" it has "previously identified as relevant to such an assessment." *In re Newman*, [1990-92 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 25,356 at 39,191 (CFTC Aug. 6, 1992). If, however, an ALJ's analysis does not reflect such a reasoned application of appropriate factors, we will not defer to his assessment of penalties. *Id.*

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decision's liability analysis shall not be cited as Commission precedent or generally regarded as an expression of the Commission's views on the issues resolved by the judge.

As noted above, the ALJ's decision includes neither a discussion of the sanctions issues raised by the parties nor an explanation of the mix of sanctions the judge decided to impose. Moreover, as discussed below, the results of the ALJ's analysis cannot be squared with applicable Commission precedent. In these circumstances, deference to the ALJ's sanctions analysis is not warranted.

Our independent review of the evidence and arguments relating to the calculation of an appropriate civil money penalty establishes that this sanction cannot be imposed on the present record. At the time the complaint in this matter was issued, Section 6(d) of the Commodity Exchange Act required the Commission to consider the gravity of respondent's violations and either (1) the appropriateness of the penalty to the size of respondent's business and ability to continue in business, or (2) the appropriateness of the penalty to respondent's net worth. Commission precedent established procedures for developing the record on these issues. *In re Murlas Commodities Inc.*, [1987-1990 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 24,440 (CFTC Apr. 24, 1989). The ALJ did not follow those procedures in this case.[4] Because the appropriate procedure has not been followed, the civil money penalty must be vacated and the case remanded for further proceedings. *See In re First National Trading*

[4] The judge may have erroneously applied a recent amendment to Section 6(d) of the Act. In the Futures Trading Practices Act of 1992 ("FTPA"), Congress redesignated this subsection as Section 6(e) and removed the Commission's obligation to look beyond the gravity of respondent's violations. In *In re Gordon*, [1992-94 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 25,667 at 40,182 n.5 (CFTC Mar. 16, 1993), however, we determined that this amendment would not be applied retroactively.

*Corp.*, [1992-1994 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 26,142 at 41,789 (CFTC July 20, 1994).

On remand, the ALJ shall calculate the civil money penalty he imposes in a manner consistent with *Gordon's* clarification of the starting point for the assessment of a civil money penalty.[5] In his decision, the judge found that both the financial losses customers suffered and the financial benefits that Miller accrued during the relevant period exceeded $800,000.[6] As the Division emphasizes, however, the level of civil money penalty the ALJ imposed is only one quarter of this amount. In the absence of any explanation by the judge, such a substantial discrepancy,

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[5] Traditionally, our analysis has focused on the general gravity of the unlawful conduct and any circumstances that aggravate or mitigate the particular respondent's conduct. *See In re Premex, Inc.*, [1987-1990 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 24,165 at 34,890-93 (CFTC Feb. 17, 1988). Once the overall gravity of respondent's violations was assessed, we looked to Commission-approved penalties in analogous cases. *See In re Incomco*, [1990-1992 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 25,198 at 38,536 (CFTC Dec. 30, 1991). In the absence of analogous cases, however, a presiding officer had little guidance on converting his assessment of overall gravity into a specific money penalty. In *Gordon*, we held that absent a specific finding that such an approach was impractical or inappropriate, the starting point for the judge's analysis should be either the financial benefit that accrued to respondent or the losses suffered by his customers as the result of his wrongdoing.

[6] Miller challenges these findings on appeal, arguing that the Division has failed to establish that either the financial benefits or losses it relies upon were a product of the wrongdoing established on the record. Indeed, he argues that the judge should have limited his focus to the benefits derived from or losses suffered by the customers who testified at the hearing. In light of our remand for further development of the record, we need not resolve this challenge at this time. At the hearing, the ALJ should give both parties latitude in developing the record on the proper approach for measuring benefits and losses.

standing alone, is sufficient to establish an abuse of discretion in calculating a civil penalty.

Miller challenges the ALJ's imposition of a trading prohibition on the basis that the judge's analysis is a departure from Commission precedent which limits such sanctions to situations where a nexus exists between the respondent's violation and the integrity of the futures markets as in *In re Citadel Trading Co.*, [1986-1987 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 23,082 at 32,188 (CFTC May 12, 1986). He also challenges the judge's selection of a permanent prohibition as inconsistent with Commission precedent. The Division does not specifically address the issue of a trading prohibition but generally argues that the ALJ's sanctions other than the civil money penalty were appropriate.

The Commission's traditional interpretation of its nexus requirement has focused on a direct connection between the wrongdoing giving rise to a violation and the integrity of the market mechanism. *See In re Incomco, Inc.*, [1990-92 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 25,198 at 38,537 (CFTC Dec. 30, 1991) (24-month trading prohibition affirmed where Commission found a nexus between market integrity and respondent's failure to carry a customer's account under its true name and submit forms related to the customer's reportable positions); *In re Citadel Trading Co.*, ¶ 23,082 at 32,191 (trading prohibition vacated where no nexus between solicitation fraud and market integrity found as to one respondent, but trading prohibition affirmed where nexus

between violations and market integrity found as to another respondent).[7]

We have reexamined our precedent and decided to broaden our application of the nexus test in the manner described by the Seventh Circuit in *Monieson v. CFTC*, 996 F.2d 852 (7th Cir. 1993). In *Monieson*, the chairman of the board of a futures commission merchant was found liable as a controlling person for two employees' fraudulent allocation of trades and for failure to supervise. Monieson challenged the Commission's imposition of a two year trading prohibition on the basis that there was no nexus between his violations and the integrity of the futures markets. In affirming the Commission's decision, the court stated:

> [Monieson's employees'] misallocation of trades may not have affected the prices of futures contracts or interfered with normal trading patterns, but it could certainly be viewed as affecting the public perception of the market.

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[7] *But see In re Paragon Futures Assoc.*, [1990-92 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 25,266 at 38,852 (CFTC April 1, 1992):

> When the Commission registers an individual as an associated person it gives that individual the right to handle the accounts and, thus, the funds of his customers. Inherent in that right is the requirement of the registrant to discharge his responsibilities in an honest, forthright manner befitting the fiduciary duty bestowed upon him by the [Commodity Exchange Act]. By engaging in unauthorized trading or any other type of fraud, an associated person violates this right, breaches his position of trust, and illegally takes from the customer that which the customer has earned, saved, and sought to invest. The consequence of said violation, breach and illegal act is that the integrity of the futures market is indeed damaged.

(Commissioner Dial, concurring in part, and dissenting in part).

> Customers were having losing trades dumped in their accounts by brokers who were almost able to cover it up. Such malfeasance certainly diminishes the integrity of the market in the public eye. It also "threatens the orderly operation of the market" by ignoring procedural rules designed to prevent fraud.

*Id.* at 863 (citation omitted).

While the malfeasance in the instant case involves fraudulent solicitation of trades rather than misallocation of trades as in *Monieson*, the potential harm to the "integrity of the market in the public eye" identified by the Seventh Circuit is the same. Public perception, protection, and confidence in our markets is more important to the CFTC's mission than the mechanical application of a technical nexus requirement.

The term of the prohibition turns on the gravity of Miller's violations. *Incomco*, ¶ 25,198 at 38,537. We continue to believe that a permanent trading prohibition is "rarely appropriate" because it broadly prohibits even trading as a customer, and should be reserved for conduct that is both intentional and egregious. *In re GNP Commodities Inc.*, [1990-1992 Transfer Binder) Comm. Fut. L. Rep. (CCH) ¶ 25,360 at 39,222 (CFTC Aug. 11, 1992). Nevertheless, our review of the record establishes that this is a case in which a permanent prohibition is warranted.[8]

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[8] As noted *supra*, the parties dispute the amount of the economic benefit or loss flowing from Miller's wrongdoing. We have not considered this factor in either assessing whether to impose a trading prohibition or determining an appropriate length for the prohibition. In our view, the testimony of the seven customers presented by the Division is sufficient to establish the existence of a pattern of fraud over

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The record establishes that Miller engaged in a pattern of wrongdoing that extended over several years. Moreover, the nature of his misrepresentations was egregious. Miller guaranteed profits and promised wildly exaggerated returns. He compared the risk of trading options to investments such as savings accounts and mutual funds. Given the nature of these representations, we have no difficulty inferring that Miller's false statements were intentional rather than reckless. In these circumstances, we conclude that to protect the integrity of the market, it is appropriate to prohibit Miller permanently from trading in the markets regulated by the Commission.[9]

## CONCLUSION

Based on the foregoing, we affirm the ALJ's liability determinations. In light of our independent review of the record, we revoke Miller's registration as an associated person and impose a cease and desist order and permanent trading prohibition.[10] We vacate the civil money penalty imposed by the ALJ and remand for further proceedings consistent with this decision.

IT IS SO ORDERED.

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a significant period of time. Such a pattern is sufficiently egregious to warrant a permanent trading prohibition.

[9] Miller also challenges the cease and desist order and registration revocation imposed by the ALJ, generally arguing that these sanctions are unduly excessive. Given the nature of respondent's wrongdoing, however, the record provides ample support for the imposition of these sanctions.

[10] These sanctions will not become effective until the remanded portion of this proceeding is finally resolved.

By the Commission (Commissioners DIAL, TULL, and HOLUM) (Chairman SHAPIRO and Commissioner BAIR, dissenting in part).

/s/ Jean A. Webb
Jean A. Webb
Secretary of the Commission
Comodity Futures
Trading Commission

Dated: June 16, 1995

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**Dissenting Opinion of**
**Chairman Mary Schapiro and**
**Commissioner Sheila Bair**

While fully supporting the imposition of strong sanctions in this matter, we dissent from that portion of the Commission' opinion which imposes a permanent trading prohibition on respondent Miller.

Prohibitions on personal trading have no analog in actions brought by securities and bank regulators. Under the Commodity Exchange Act, however, we have imposed a ban on a respondent's personal trading where a nexus was found to exist between violation and the integrity of the futures markets. *In re Incomco* [1990-1992 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 25,198 at 38,537 (Dec. 30, 1991); *In re Citadel*, [1986-1987 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 23,082 at 32,191 (CFTC May 23, 1986).

Now, the majority would stretch the Commission's traditional "nexus" requirement so far as to render it virtually meaningless. We can think of *no* type of violation of the CEA, other than possibly recordkeeping violations,

which would not meet the liberal test articulated today. To reach this result, the majority depends (upon an overly expansive reading of language in *Monieson v. CFTC*, 996 F.2d 852 (7th Cir.), while failing to acknowledge that *Monieson* involved a trade allocation scheme that was facilitated by the personal trading of the primary violators. Nor can the majority's expansive holding in this case be reconciled with the Second Circuit's warning "that the Act does not compel [the Commission] to impose across-the-board suspensions automatically whenever any violation is shown, and that it has, and should exercise discretion in the individual case to determine how much of the full statutory remedy it should invoke." *Haltmeir v. CFTC*, 554 F.2d 556, 564 (2d Cir. 1977).

The majority seeks to justify broad-based imposition trading prohibitions by arguing in essence that there is a "nexus" between the public's *perception* of market integrity and allowing violators of the Act to continue to participate in the markets as customers. We cannot subscribe to this view. Futures markets are anonymous markets characterized by confidential customer identities and clearinghouses which act as the universal counterparty. Customers don't know who their counterparties are – nor do they care given the fact that the exchange clearinghouse guarantees performance on each trade.

Further, the length of the trading prohibition imposed in this case is clearly inconsistent with Commission precedent. As the Commission has previously stated:

> [a] trading prohibition is a remedial sanction imposed to protect the futures markets from conduct which inherently threatens their orderly operation. A permanent prohibition is not in order if such a sanction is intended to punish a respondent

> for violations which, although grave, have no effect on the integrity of the futures market.

*Incomco*, at 38,537.[1] The majority states that it would limit permanent trading prohibitions to egregious cases. In our experience, Miller's conduct, despicable and serious though it is, is simply not distinguishable from the many other cases of solicitation fraud that the Commission has addressed.

We share the Commission's desire to "get tough" on violators of the CEA. But a trading prohibition is not tough or meaningful, merely symbolic, when applied to a respondent who does not engage in personal trading. There is no evidence that Miller has engaged in personal trading or ever intends to do so – and that is not atypical in cases such as this. Those who engage in solicitation fraud seldom put their own funds at risk. In such cases, a tough enforcement policy is better achieved by swiftly commencing enforcement actions against alleged violators, securing disgorgement of ill-gotten profits, and imposing registration revocations and stiff civil monetary penalties. Resources and time spent litigating over personal trading prohibitions in context such as this amount to a lost opportunity for using our resources to pursue other violators.

Market integrity has been protected and enhanced under the Commission's traditional nexus test. Under that test, persons who have misused market mechanisms are

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[1] In *Monieson*, heavily relied upon by the Commission, the court expressed concern about the length of the *two-year* trading prohibition in that case terming it "a harsh penalty (though of course preferable to the ALJ's lifetime prohibition). . . ." *Monieson*, 996 F.2d at 863.

removed from the market. With this decision, the majority has opened the door to the mechanical imposition of permanent trading prohibitions in virtually every case before it. In many cases, such a policy will be extreme; far too many others, it will be entirely meaningless.

[¶ 26,084] In the Matter of Miller.

Commodity Futures Trading Commission. No. 92-4.
May 25, 1994. Initial Decision in full text.

**Antifraud – Misrepresentations – Options.** – An AP violated Section 4c(b) and Reg. § 33.10 by fraudulently inducing customers to invest in commodity options by making false, deceptive or misleading statements of material fact, and by failing to disclose material facts to potential customers.

See ¶ 12,825, "Liabilities – Prohibitions" division, Volume 1.

**Associated Persons – Options – Misrepresentations – Sanctions.** – As a result of violating Reg. § 33.10 and Section 4c(b), an AP was ordered to cease and desist from further violations; was assessed a $200,000 civil penalty; and was banned from trading. In addition, his registration was revoked.

See ¶ 12,825, "Liabilities – Prohibitions" division, Volume 1.

*Jennifer Larabee, Esq.* and *Louis V. Traeger, Esq.*, Los Angeles, California, for the Commodity Futures Trading Commission, Division of Enforcement.

*Robert E. Thompson. Esq.*, San Francisco, California, for respondent.

Opinion of PAINTER, Administrative Law Judge.

Preliminary Statement:

On November 19, 1991, the Commission filed a complaint and notice of hearing pursuant to sections 6(b),

6(c), 8a(3), and 8a(4) of the Commodity Exchange Act ("Act"), as amended, 7 U.S.C. §§ 9, 13b, 12a(3), and 12a(4), charging Howard Miller with violations of section 4c(b), 7 U.S.C. § 6c(b), of the Act and Commission Regulation 3110, 17 C.F.R. §33.10. A hearing was held in Los Angeles on November 3-4 and 23, 1993. Post-hearing briefing was concluded on March 30, 1994.

At all times relevant to the complaint, respondent Howard Miller ("Miller") was registered with the Commission as an associated person pursuant to section 4k of the Act, 7 U.S.C. § 6k, as amended. [Commission records]. Miller was employed as an associated person by the Siegel Trading Company ("Siegel"), a registered futures commission merchant, from October 21, 1981 to May 1991; and at Star Trading, a registered introducing broker, from May 1991 to the present. The allegations of the complaint relate only to Miller's employment as an associated person at the Siegel Trading Company from about January 1987 to April 1989.

The complaint alleges that from about January 1987, and continuing through April 1991, Miller, in connection with an offer to enter into, the entry into, or the confirmation of the execution of, or the maintenance of commodity options, transactions, cheated, defrauded, or deceived, or attempted to cheat, defraud or deceive, other persons by making false, deceptive or misleading representations or omissions of material fact during the course of soliciting Siegel customers or prospective customers, in violation of Section 4c(b) of the Act and Regulation 33.10.

Specifically, the Commission alleges that in the course of soliciting prospective customers to open commodity options accounts with Siegel, and in the maintenance of

those accounts, Miller made false, deceptive or misleading representations or omissions of material fact 1) concerning the likelihood of making a profit in a commodity options account; 2) concerning his experience and performance record with other customers; 3) regarding the material fact that the vast majority of Miller's customers lost money trading options while he himself was aware that 80 to 85% of his customers lost money trading commodity options; and 4) vitiating the oral and written risk disclosures for commodity options trading given to his customers. In essence, the Commission alleges that Miller made false, deceptive or misleading representations while engaging in a high-pressure sales campaign that utilized classic boiler-room tactics. In his Answer respondent Miller denied any wrongdoing.

At the hearing, the Division of Enforcement ("Division") called seven former customers of Siegel for whom Miller served as broker. All of the former customers testified to misrepresentations and fraudulent practices committed by Miller in the course of soliciting them to open accounts with Siegel and in the course of soliciting them to purchase commodity options.

The trial of this matter took place in Los Angeles, California, on November 3 and 4, 1993. The parties have filed post-trial briefs and this matter is ready for decision.

FINDINGS OF FACT:

1. Michael Scully had an account with Siegel from January 1991 to May 1991 with Miller serving as the broker responsible for his account. [Hearing transcript ("Tr.") pp. 12, 302, Division of Enforcement Exhibit ("DOE ex.") 14]. Scully testified that he had no experience trading

commodities and had no investment experience other than an Investment Retirement Account. [Tr. 12-13]. According to Scully, Miller cold-called him and indicated that they had spoken previously about Japanese yen options, claiming that if Scully had followed Miller's earlier recommendations, he would have tripled his money. In fact, Scully had never spoken with Miller before. [Tr. 11-13]. In a separate call, Miller urged Scully to purchase June T-bonds and told him that "tripling" his money was a "conservative estimate." [Tr. 15-16]. Miller told Scully that if he purchased Deutschmarks he would "triple" his money and that in 1989 Miller had "made a killing" for his clients. [Tr. 13-15]. He sent account-opening documents to Scully by messenger and instructed the messenger to remain with Scully until Miller called again. Miller then called and indicated that the option had gone up another point since they had last spoken but that Miller could still give Scully the original price if he signed the account-opening documents and purchased the option immediately. [Tr. 16-17, 31]. Scully further testified that Miller never discussed the risks involved with the purchase of commodity options, failed to tell him that the majority of his customers lost money, and never explained how much of the purchase price constituted commissions. [Tr. 13-15, 18, 19-20]. Finally, Scully testified that Miller vitiated the risk disclosure statement by telling Scully that it was written by Siegel's attorneys to protect Siegel, and that Miller stated "[d]on't worry, this is a winner, you know . . . You are going to make money, anyway." [Tr. 18-19, 34; DOE ex. 14-3].

2. Donald Kenneth Black had an account with Siegel from approximately October 1987 through April 7, 1989 with Miller serving as the broker responsible for Black's

account. [Tr., Respondent's Exhibit ("Res. ex.") 6]. Black testified that he had no experience trading in commodity options and his prior investment experience consisted of investing in a mutual fund. [Tr. 234-236, 262]. According to Black, Miller cold-called him, and after several conversations, Black finally agreed to become his customer. [Tr. 234]. Miller told Black that his other customers were "tripling" and "doubling" their money and that Black could profit in the same manner. [Tr. 236]. Miller told Black that a return of $20,000 was not uncommon. [Tr. 237]. Miller also told Black that the loss of an initial investment almost never happened because the clients' accounts were closely monitored and if the value of the option went down, Miller would sell the option. [Tr. 239]. Miller told Black that the options Miller was recommending did not involve a high degree of risk, that some commodity options were more risky than others, and that Miller would recommend only the more conservative options and not the highly speculative ones. [Tr. 240]. Miller also compared the rate of return from options trading to those of savings accounts or mutual funds. [Tr. 239-241]. Miller sent a messenger to Black's business at closing time to give Black the account-opening documents and collect a check. He told Black that if he gave a certified check to the messenger, Miller would advance Black the funds so that Miller could make the trade the next morning, which was important because the price was going up. [Tr. 252-254, 261].

3. Lloyd Barnes had an account with Siegel from July 1987 through July 1989 with Miller serving as the broker responsible for his account. [Res ex. 8]. Barnes testified that in or about July 1987, Miller cold-called him and told him he could easily "triple" or "double" Barnes' money in Swiss francs. [Tr. 84-85; DOE ex. 5]. Miller told

Barnes that 80% of his customers made money with him. [Tr. 89]. Miller later told Barnes that he could guarantee "tripling" or "doubling" his money. [Tr. 94, 107]. Miller told Barnes that it was important to return the account papers to Miller right away and sent the account-opening documents by Federal Express. Miller gave Barnes the Federal Express account number and instructed him to return the signed documents and the check the next day. [Tr. 91-92]. On another occasion, Miller called Barnes and said that sugar was going to triple in price and that Barnes had to get into sugar options. After Barnes told Miller that he wasn't interested, Miller called him back an hour later and told him he had lost one thousand dollars by waiting an hour, and again urged Barnes to get into sugar. Barnes repeated that he was not interested, and Miller called Barnes again twenty minutes later to offer to get him in "at the first price if you do it now," even though the price had changed. [Tr. 89] Miller also told Barnes that he could triple Barnes' money easily on the sugar options. [Tr. 89].

4. Armand George Mezey had an account with Siegel from approximately March 1987 through August 1989 with Miller serving as the broker responsible for his account from August 1987 to August 1988. [DOE ex. 20]. Mezey testified that Miller told Mezey that he had customers who had tripled and doubled their money by purchasing options and that he had made a lot of money for his other clients. [Tr. 120, 127; DOE ex. 11]. Miller attributed Mezey's earlier trading losses to the fault of Mezey's previous broker, claiming that Mezey's previous broker had let the options expire. [Tr. 134]. Miller said that if Mezey became his customer, he would stay on top of Mezey's account and make sure none of the options expired. However, at least three of Mezey's options expired

worthless. [Tr. 122, DOE ex. 20-19, 20-26]. In an attempt to get Mezey to purchase additional options, Miller claimed "[t]his is a sure thing. Some of my clients in the past have doubled or tripled their money. Let me recoup your losses." [Tr. 123]. Mezey testified that Miller vitiated Siegel's risk disclosure procedure by telling Mezey that the verification taping was a formality. [Tr. 132; DOE ex. 19-24].

5. Eddie Timmons had an account with Siegel from approximately June 8, 1990 through May 31, 1991. From at least June 8, 1990 through May 2, 1991, Miller was the broker responsible for his account. [Tr. 140; DOE ex. 17]. Timmons testified that Miller cold-called him, claiming to have been in the business of selling options for twenty years with a good record. [Tr. 147]. According to Timmons, Miller told him that the purchase of cotton options was a "really good investment" because heavy rains in Texas had almost wiped out the cotton crop. Miller told Timmons he should be able to double or triple his money within 30 days. [Tr. 141]. In an attempt to get Timmons to purchase cattle options, Miller told Timmons that certain cattle ranchers that Miller knew and worked with purchased cattle options for the 4th of July because that holiday is a "beef holiday," whereas for Christmas or Thanksgiving people bought ham and turkey. In this particular sales push, Miller stated, "I've got two ranchers that always seem to make money doing this, every year, and I've been with them for a long time . . . It's a good thing to get into. We can recover some of what we lost before . . . We could really make a killing on this." [Tr. 143-144]. Miller never told Timmons that the majority of his customers lost money. [Tr. 142]. Timmons then asked Miller why he had not made any money on his purchases. Miller's response

was to induce Timmons to continue trading by saying "[t]he rest of my customers are doing great . . . this one here will turn you around." [Tr. 148].

6. Lee Patrick Cowan had an account with Siegel beginning on or about November 10, 1988 through June 1989 with Miller serving as the broker responsible for his account. [Tr. 190; Res. ex. 4]. Cowan testified that prior to Miller's solicitation, Cowan had no investment experience in commodities, commodity options, securities or security options. [Res. ex. 4, at 2-3]. According to Cowan, Miller called him and claimed that if Cowan purchased a copper option he could "double" or "triple" his money within one month because it was a "sure deal." [Tr. 190]. Miller sent a courier in a taxicab to collect the account-opening documents and a check from Cowan. [Tr. 192]. Approximately four days after Cowan purchased the first copper option, Miller called him and solicited him to purchase a second copper option by claiming that because another customer was buying $100,000 of options, Miller could get it for Cowan at a lower price. [Tr. 192-194]. In an attempt to get Cowan to purchase a third copper option, Miller claimed that the third option was "insurance" against loss and told Cowan that he would "triple" his money, turning an $11,000 initial investment into $33,000. [Tr. 194, 214]. Miller told Cowan that all of his customers made money, otherwise he would not be in business. He never told Cowan that the majority of his customers lost money. [Tr. 191].

7. Robert Weaver had an account with Siegel from approximately May 1988 through April 1989 with Miller serving as the broker responsible for his account. (Tr. 63). Weaver testified that in the course of soliciting Weaver to purchase soybean options, Miller told Weaver he had a

"sure winner" and a "no-miss proposition." (Tr. 63). In the course of soliciting Weaver to purchase additional options, Miller claimed he had "another sure winner." (Tr. 69). After Weaver had lost almost $20,000, Weaver told Miller that he could not afford to buy any more options. In response, Miller told Weaver that he could not afford not to buy more options, that the new options Miller was recommending "couldn't miss making money," and that Weaver would make all his money back "and then some." (Tr. 69-70). Miller never told Weaver that the majority of his customers lost money, but rather told him that he and his other clients were buying the options that he recommended to Weaver. (Tr. 69).

8. Miller appeared on Siegel television commercials during 1987 through at least June 1989 and on occasion represented that listeners could expect to make huge profits investing in options without disclosing that most of his customers lost money. I find that Miller knowingly concealed the truth from his listeners in order to induce them to purchase commodity options. (DOE ex. 5; Responses to Requests for Admissions 18, 140, 144, 111, 125, 158, 161)

9. Tena Friery, a CFTC senior futures trading investigator, testified that an analysis of Siegel records disclosed that from January 1, 1984 to July 31, 1989 79.5% of Miller's customers lost money trading options. In 1987 Miller's customers lost $448,850 and Miller received $476,185 in commissions. In 1988 Miller's customers lost $438,242 while Miller received commissions of $538,586. (Tr. 167-176; DOE exs. 11, 21) From January 1, 1984 to July 31, 1988, nine of Miller's customers made more than $5,000, while 58 customers lost more than $10,000, and 109 lost more than $5,000. (DOE ex. 11)

10. Miller testified that he told his customers that 80% of all commodity speculators lose money. (Tr. 305) However, he qualified this statement by stating that "I never discussed my own customers on account of I felt that it was unethical to tell another person how another is doing in the market". (Tr. 306) The customers who testified in this proceeding testified that Miller did not disclose the fact that most commodity speculators lost money. Thus, I reject as untrue Miller's testimony that he routinely informed customers and potential customers that 80% of all commodity speculators lose. Respondent Miller was an unreliable and evasive witness.

11. Jennifer Nicole Martin, in testifying on behalf of Miller, stated that Miller read the risk disclosure statement to every customer. (Tr. 274-283) Her testimony lacked credibility and was contradicted by the customer witnesses. I am find that the customers testified honestly.

12. After carefully reviewing the evidence I conclude that the findings proposed by the Division of Enforcement are fully supported by the evidence adduced, and those proposed findings are incorporated herein by reference.

DISCUSSION:

The evidence of record establishes that Miller fraudulently induced customers to invest in commodity options by making false, deceptive or misleading statements of material fact, and by failing to disclose material facts to potential customers. Miller deliberately misled customers as to the reasonable expectations of making a profits on commodity options. As argued by the Division of Enforcement, Miller had no basis in fact for the recommendations he made to customers. Miller had one objective in mind:

induce the customer to open an account and trade, thus making a commission for Miller. The use of such phrases as a "no miss proposition", "a sure thing," and assurances that customers would triple their investment led customers to believe that there was neglible risk in investing in these instruments. That clearly was not the ease. Miller knew at all times that nearly 80% of his customers lost money, and he was aware that none of his customers "tripled" their investment. It is no surprise that in 1987 Miller made $447,185 and his customers lost $448,850, and that in 1988 Miller made $538,586 in commissions while his customers lost $438,242. In sum, Miller engaged in a scheme to cheat and defraud customers and to make large commission profits at the expense of his customers. Miller proved to be an expert not on how to invest in commodity options, but rather in how to deceive and defraud customers for his own benefit.

## ORDER

The Division of Enforcement has established by the weight of the evidence that respondent Miller violated section 4c(b) of the Commodity Exchange Act and Commission regulation 33.10 as described in the findings set out above and incorporated by reference. Accordingly it is ORDERED:

a. that respondent Miller cease and desist from violating section 4c(b) of the Act and Commission regulation 33.10;

b. that respondent Miller's registration as an associated person be, and it is hereby, revoked;

c. that respondent Miller be banned, and he is hereby banned, from trading on or subject to the rules of any contract market, and that all contract markets refuse Miller trading privileges.

d. that respondent Miller pay a civil monetary penalty of $200,000 within 30 days from the date this order becomes final.

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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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| HOWARD MILLER,<br>Petitioner,<br>v.<br>COMMODITIES [sic] FUTURES TRADING COMMISSION,<br>Respondent. | No. 04-73914<br>CFTC No. 92-4<br>Northern District of California San Francisco<br>ORDER<br>(Filed Jun. 1, 2006) |

Before: REINHARDT, NOONAN, and HAWKINS, Circuit Judges.

The majority of the judges votes to deny the petition for rehearing. Judge Reinhardt votes to grant the petition for rehearing. Judges Reinhardt and Hawkins vote to deny the petition for rehearing en banc, and Judge Noonan so recommends.

The full court has been advised of the petition for rehearing en banc, and no judge has requested a vote whether to rehear the matter en banc. Fed. R. App. P. 35.

The petition for rehearing is DENIED and the petition for rehearing en banc is DENIED.

**UNITED STATES OF AMERICA**
**Before the**
**COMMODITY FUTURES TRADING COMMISSION**

| | |
|---|---|
| **In the Matter of** | **CFTC Docket No. 92-4** |
| **HOWARD MILLER** | **COMPLAINT AND NOTICE OF HEARING PURSUANT TO SECTIONS 6(b), 6(c), 8a(3) AND 8a(4) OF THE COMMODITY EXCHANGE ACT, AS AMENDED** |
| **Respondent.** | **(Filed May 19, 1991)** |

I.

The Commodity Futures Trading Commission ("Commission") has received information from its staff which tends to show, and the Commission's Division of Enforcement ("Division") alleges that:

RESPONDENT

1. *Howard Miller* ["Miller"] resides at 140 Ocean Park Boulevard, Apartment 620, Santa Monica, California 90405. Miller was employed as an associated person by the Siegel Trading Company, ["Siegel"], a registered futures commission merchant, from October 21, 1981 to May 1991; and at Star Commodity, a registered introducing broker, from May 1991 to the present. Miller has been continuously registered with the Commission as an associated person pursuant to Section 4k of the Commodity Exchange Act, as amended ("Act"), from on or about October 21, 1981 to the present.

BACKGROUND

2. From on or about October 1981 and continuing to May 1991, Miller solicited members of the general public to open commodity options trading accounts with Siegel.

3. Miller had no experience or training in commodity options trading or analysis of commodity options markets prior to being hired by Siegel.

4. Miller received little or no training concerning commodity options trading strategy or analysis of commodity options markets after being hired by Siegel.

5. From on or about April 1981 and continuing to May 1991, Siegel charged a 45% commission plus an additional $155 charge per turn around. During this period, Miller received 40% of the commission received from each customer.

COUNT I

Violations of Section 4c(b) of the Act, and Section 33.10 of the Regulations: Fraud in Connection with Commodity Option Transactions

6. The allegations contained in Paragraphs 1 through 5 are realleged and incorporated by reference.

7. From in or about January 1987, and continuing through April 1991, Miller, in or in connection with an offer to enter into, the entry into, or the confirmation of the execution of, or the maintenance of, commodity option transactions cheated, defrauded, or deceived, or attempted to cheat, defraud, or deceive, other persons by making false, deceptive, or misleading representations or omissions of material fact during the course of soliciting Siegel

customers or prospective customers, in violation of Section 4c(b) of the Act and Section 33.10 of the Regulations promulgated thereunder, including, but not limited to, the misrepresentations and omissions set forth in paragraphs 9 through 11 below.

8. From in or about January 1987 and continuing through April 1991, Miller engaged in a high-pressure telephone sales campaign through which he solicited members of the public who were generally unknowledgeable and unsophisticated concerning commodity options trading to open commodity options trading accounts with Siegel. From at least 1987 or before and continuing through September 1989, Miller appeared on a television program sponsored and produced by Siegel. During the course of both his telephone and television solicitations Miller made false, deceptive or misleading statements of material fact and failed to disclose facts material to the customer's decision to open commodity options trading accounts with Siegel, including, but not limited to, the misrepresentations and omissions set forth in the paragraphs 9 through 11 below. These misrepresentations and omissions generally concerned the likelihood of making a profit as a result of opening a commodity options trading account with Siegel, the risks involved in commodity options trading, Miller's expertise and performance record for previous customers, Siegel's expertise and performance record for previous customers, and the fees the customer would be charged by Siegel.

False, Deceptive or Misleading Representation
Concerning the Likelihood of Making a Profit

9. Miller made materially false, deceptive, or misleading representations concerning the likelihood of making a profit including, but not limited to, representations that:

A. "You're gonna make big money."

B. "You're gonna triple your money."

C. purchase of a particular option was "a sure winner" and that the purchase "couldn't miss".

D. it was "a sure thing."

E. the realistic "worse case scenario" – was to make only a 20% return.

At the time Miller made these representations he either knew them to be false or did not have a reasonable basis in fact for making them.

False, Deceptive or Misleading Representations
and Omissions Concerning the Risks
Involved in Trading Commodity Options

10. Miller made materially false, deceptive or misleading representations concerning the risk involved in trading in commodity options including, but not limited to, representations that:

A. "There's no way you're gonna lose on this."

B. "No way we can lose on this deal."

C. 80% of his customers made money and only 20% lost money, when, in fact, between

January 1, 1984 and July 1989, 82% of his customers *lost* money.

D. "I wouldn't be talking about sugar if I thought you could lose."

At the time Miller made these representations he either knew them to be false or did not have a reasonable basis in fact for making them.

False, Deceptive or Misleading Representations Concerning Siegel's Expertise and Performance Record and Miller's Expertise and Performance Record

11. Miller made materially false, deceptive, or misleading representations concerning Siegel's expertise and performance record, as well as his own expertise and performance record in commodity options trading including, but not limited to, representations that:

A. Siegel had a great track record of making money for its customers, when in fact, 86% of Siegel's customers lost money.

B. his customers were making lots of money based on his recommendations, or words to that effect, when in fact 82% of his customers lost money.

C. all of his customers, with the exception of the customer to whom he was speaking, were making money, when in fact 82% of his customers lost money.

At the time Miller made these representations, he either knew them to be false or did not have a reasonable basis in fact for making them.

II.

By reasons of the foregoing allegations by the Division, the Commission deems it necessary and appropriate, pursuant to its responsibilities under the Act, to institute a public administrative proceeding to determine whether the allegations set forth in paragraphs 1 through 11 are true, and if so, whether an order should be entered in accordance with Sections 6(b), 6(c), 8a(3)(M) and 8a(4) of the Act, 7 U.S.C. §§9, 13b, 12a(3)(M), and 12a(4) (1986):

a. directing Miller to cease and desist from violation of Section 4c(b) of the Act and Section 33.10 of the Regulations promulgated thereunder;

b. suspending or revoking any current registrations of Miller;

c. prohibiting Miller from trading on or subject to the rules of any contract market and requiring all contract markets to refuse Miller all trading privileges thereon; and

d. assessing Miller a civil penalty of not more than $100,000 for each violation of the Act and Regulations.

WHEREFORE, IT IS HEREBY ORDERED that a public hearing for the purpose of taking evidence and hearing argumen s on the allegations and questions set forth in Count I above be held before an Administrative Law Judge in accordance with the Rules of Practice under the Act, 17 C.F.R. §§10.01 *et seq.*, at a time and place to be fixed as provided by Section 10.61 of the Rules of Practice, 17 C.F.R. §10.61, and that all post-hearing procedures shall be conducted pursuant to Sections 10.81 through 10.107 of the Rules of Practice, 17 C.F.R. §§10.81-10.107.

III.

IT IS FURTHER ORDERED that the respondent shall file an Answer to the allegations made against him in this Complaint within twenty (20) days after service of the Complaint and Notice of Hearing, pursuant to Section 10.23 of the Rules of Practice, 17 C.F.R. §10.23, and shall serve two copies of such Answer and of any document filed in this proceeding upon Jennifer Larabee, Division of Enforcement, Commodity Futures Trading Commission, 10880 Wilshire Boulevard, Suite 1005, Los Angeles, California 90024 or such other counsel as may be designated by the Division. If the respondent fails to file the required Answer or fails to appear at a hearing after being duly notified, the respondent may be deemed in default, and the proceeding may be determined against him upon consideration of the Complaint, the allegations of which shall be deemed to be true.

IT IS FURTHER ORDERED that this Complaint and Notice of Hearing shall be served on the respondent personally or by registered or certified mail forthwith.

In the absence of any appropriate waiver, no officer or employee of the Commission engaged in the performance of investigative or prosecutorial functions in this or any factually related proceeding will be permitted to participate or advise in the decision upon this matter except as witness or counsel in a proceeding held pursuant to notice.

By the Commission.

Dated: November 19, 1991 /s/ Jean A. Webb
Jean A. Webb
Secretary to Commission
Commodity Futures
Trading Commission

Robert E. Thompson
110 Sutter Street
Suite 501
San Francisco, California 94104
Telephone: (415) 543-2818

Attorney for Respondent
HOWARD MILLER

**UNITED STATES OF AMERICA**
**COMMODITY FUTURES TRADING COMMISSION**

| | |
|---|---|
| In the Matter of<br>HOWARD MILLER<br><br>Respondent. | CFTC Docket No. 92-4<br><br>ANSWER OF<br>HOWARD MILLER |

Respondent Howard Miller ("Miller") submits the following in answer to the allegations contained in the Complaint and Notice of Hearing Pursuant to Sections 6(b), 6(c), 8a(3) and 8a(4) of the Commodity Exchange Act, as Amended ("complaint").

1. Mr. Miller admits the allegations contained in paragraph 1 of the complaint.

2. Mr. Miller admits that he was employed by Siegel from about October 1981 through May 1991, but denies that he solicited members of the general public.

3. Mr. Miller admits the allegations contained in paragraph 3 of the complaint.

4. Mr. Miller lacks information and/or knowledge sufficient to admit or deny the allegation(s) contained in

paragraph 4 of the complaint and therefore denies such allegation(s).

5. Mr. Miller lacks information and/or knowledge sufficient to admit or deny the allegation(s) contained in paragraph 5 of the complaint that from about April 1981 and continuing to May 1991, Siegel, charged a 45% commission plus an additional $155 charge per turn around. Miller denies the remaining allegations contained in paragraph 5 of the complaint.

Count I

6. Mr. Miller incorporates herein by reference and reasserts his answers to paragraphs 1 through 5, above.

7. Mr. Miller denies each and every allegation contained in paragraph 7 of the complaint and demands strict proof of such allegations.

8. Mr. Miller admits that between 1987 and September 1989, he made appearances on a television program and discussed commodity options trading through Siegel. Mr. Miller denies the remaining allegations contained in paragraph 8 of the complaint and demands strict proof of such allegations.

9. Mr. Miller denies each and every allegation contained in paragraph 9 of the complaint and demands strict proof of such allegations.

10. Mr. Miller denies each and every allegation contained in paragraph 10 of the complaint and demands strict proof of such allegations.

11. Mr. Miller denies each and every allegation contained in paragraph 11 of the complaint and demands strict proof of such allegations.

FIRST AFFIRMATIVE DEFENSE

1. As and for a first affirmative defense, Mr. Miller alleges that the complaint fails to state facts sufficient to state a cause of action.

SECOND AFFIRMATIVE DEFENSE

2. As and for a second affirmative defense, Mr. Miller alleges on information and belief that the Commission has waived any cause of action arising out of the matter set forth in the Complaint.

THIRD AFFIRMATIVE DEFENSE

3. As and for a third affirmative defense, Mr. Miller alleges on information and belief that the Commission is estopped from bringing any cause of action against him arising out of the matter set forth in the complaint by its unclean hands or other actions.

FOURTH AFFIRMATIVE DEFENSE

4. As and for a fourth affirmative defense, Mr. Miller alleges that any cause of action of the complaint is barred by the doctrine of laches.

FIFTH AFFIRMATIVE DEFENSES

5. As and for a fifth affirmative defense, Mr. Miller alleges that any cause of action in the complaint against them is barred by the statute of limitations.

SIXTH AFFIRMATIVE DEFENSE

6. As and for a sixth affirmative defense, Mr. Miller alleges on information and belief that any damages resulting from his activity was due to the Commission's bad faith dealing and/or negligence, or due to the conduct of nonparties to this action, and in no way has resulted from conduct by Mr. Miller.

SEVENTH AFFIRMATIVE DEFENSE

7. As and for a seventh affirmative defense, Mr. Miller alleges on information and belief that the relief being sought against him is merely for the sake of harassment, is frivolous and is litigated in bad faith by the Commission, and therefore any sanction against Mr. Miller should be barred.

EIGHTH AFFIRMATIVE DEFENSE

8. As and for a eighth affirmative defense, Mr. Miller alleges that the complaint is barred under the doctrine of res judicata.

NINTH AFFIRMATIVE DEFENSE

9. As and for a ninth affirmative defense, Mr. Miller alleges that the complaint is barred under the doctrine of collateral estoppel.

Wherefore, Mr. Miller prays that the Commission take nothing by its complaint. Mr. Miller also prays for attorney's fees and costs.

Respectfully submitted,

Dated: December 13, 1991 /s/ Robert E. Thompson
Robert E. Thompson
Attorney for Respondent
Howard Miller

VERIFICATION

I, Howard Miller, under penalty of perjury, declare that:

I am the respondent in the above-entitled action; that I have read the foregoing ANSWER OF HOWARD MILLER and know the contents thereof; that the same is true of my own knowledge, except as to the matters which are therein stated on my information and belief, and those matters, I believe them to be true.

Executed at Los Angeles, California, on this ___ day of December, 1991.

/s/ Howard Miller
Howard Miller

UNITED STATES OF AMERICA
BEFORE THE
COMMODITY FUTURES TRADING COMMISSION

| | | |
|---|---|---|
| In the Matter of | : | |
| HOWARD MILLER | : | CFTC Docket No. 92-4 |
| Respondent. | : | |

VOLUME I

Wednesday, November 3, 1993

World Trade Center
350 South Figueroa Street
Room 310A
Los Angeles, California

The HEARING in the above-entitled matter commenced pursuant to notice, at 9:46 a.m.

BEFORE: GEORGE H. PAINTER
Administrative Law Judge
Office of Proceedings
Commodity Futures Trading Commission
2000 L Street, N.W., Suite 620
Washington, DC 20036

APPEARANCES: *On Behalf of the Commodity Futures Trading Commission:*

JENNIFER LARABEE, ESQ.
LOUIS V. TRAEGER, ESQ.
Commodity Futures Trading Commission
Division of Enforcement
Murdock Plaza, Suite 400
10900 Wilshire Boulevard
Los Angeles, California 90024
(310) 575-6783

* * *

[13] [Scully Testimony] Q. And do you recall what, if anything, Miller said to you about making a profit, if you purchased these T-bonds?

A. The idea was to triple my money, and he explained some rating system. I didn't quite understand it, but the idea was that if it moved up six points, I think, that I would triple my money, and he thought that it would even go further than that.

* * *

[19] Q. When Miller told you the T-bond option cost $2,800, did he explain how much of that amount was fees and commissions?

A. No.

Q. When did you learn how much the fees and commissions were?

A. I learned it from the woman who was reading the [20] disclosure form.

Q. And what happened then?

A. Well, I indicated I wanted to talk to Howard again, because it seemed to me to be a very high commission, almost half the money.

Q. And did you speak with Howard again?

A. Yes, I did.

Q. And what did Howard say?

A. He indicated that the commission was high because he was good, he made his customers money; that's

why he could charge that amount. I asked him how it was in the – how it compared in the industry, and he indicated that some were higher, some were lower.

Q. Did you have any further conversation with Howard at that time?

A. There were several other issues that came up in the disclosure form.

Q. Could you just tell us about them?

A. I don't recall what they were. I just remember that, going through this, that I was becoming more and more troubled as I went through it, but I can't recall specifically. I haven't seen it in two years.

Q. Do you recall anything else that Mr. Miller said to you?

A. Not on that day.

* * *

[23] CROSS-EXAMINATION

BY MR. THOMPSON:

Q. Mr. Scully, my name is Robert Thompson. I'm representing Mr. Miller on this matter. Now, you are an attorney. What school did you graduate?

A. Ohio State Law School.

Q. In what year did you pass the bar?

A. 1988.

* * *

[25] Q. And it's possible in stocks and mutual funds that you could lose all of your money; isn't that correct?

A. It's possible.

Q. Okay. Now, when you talked to the other individual at Siegel, do you remember that person's name?

A. I remember it was – I talked a woman there, and there was another – I took him to be a younger man.

Q. Do you remember the woman's name?

A. There were actually two women. I can't recall their names.

Q. Who was the first person you talked to at Siegel, other than Mr. Miller?

A. I believe it was one of the women there.

Q. Okay. And you don't recall her name?

A. I don't recall either of their names.

Q. Okay. And she told you what the commission rate was; correct?

A. Yes, she did.

Q. Okay. And what did she tell you the commission rate was?

A. Forty percent, if I recall correctly, and then there was an additional fee involved; I don't recall exactly what that was.

Q. Now, at the time that you were having this conversation with this woman at Siegel, had you already [26] signed your account statements?

A. No.

Q. Okay. You did sign your account statements after this?

A. That's correct.

Q. So it's your testimony today that, prior to investing in Siegel, you were taped?

A. Yes.

Q. And the taping procedure was for what purpose?

A. I don't know why they were taping it.

Q. What did they tell you?

A. I don't recall them telling me.

Q. Could you be confused on that, sir? Is it possible that the taping procedure was done after you had made your investment, and they were confirming the information that you had placed in your customer account agreements?

A. I know that they were taping when they went over the disclosure statement, you know, the application form. It was my understanding that I was initialing that as I went through it; that's my recollection today.

Q. Okay. But you could be wrong, you were looking through that?

A. I could be; it's been a long time.

Q. Okay. And, in fact, when you did finally sign the customer account agreement, isn't it true that on the last [27] page, right before your signature, it explains to you what the commissions are?

A. I don't recall. It wouldn't surprise me.

Q. It would not surprise you?

A. It would not surprise me. That's what we were going over when the tape recording was going on, to my knowledge. That's why I think she was tape-recording before I signed it.

Q. I understand. Okay. And it's your testimony today that the first time that you understood that you had a potential risk of losing your investment was during this taped conversation?

A. It's my belief that was the first time I understood I could lose all my money; yes.

Q. Okay. What did you believe before that?

A. That commodities were just like stocks or mutual funds, as I said, that it was a risk, but the risk is much more muted than I later understood commodities to be.

Q. But that you still could lose all your money?

A. If there was a crash, like the 1929 stock market crash.

Q. Okay. So when you entered the investment you understood that there was at least a possibility that you could lose all your money?

A. Yes.

[28] Q. Okay. Now, according to your testimony, you indicated that your verifier, or the young lady that was taping your conversations, that the verifier put you back in touch with Howard Miller?

A. That's true.

Q. Okay. And at this point what was the topic of conversation with Mr. Miller?

A. Well, it occurred on several occasions.

Q. No, I'm talking about the first one.

A. I don't recall what order they occurred. The first one that comes to mind was the issue of losing your money.

Q. Okay. So the verifier told you that you could lose your money, and you said what, "This isn't what I wanted?"

A. No. She was reading a statement that indicated that commodities is a risky investment, you could lose all your money in this, and that's when I indicated essentially what I've indicated here, and that is, "Wait a second. I thought this was more like, you know, stocks or mutual funds. How risky is this?"

Q. And you're saying that you told that to the verifier, on tape?

A. I don't know if I said, "stocks or mutual funds," but that was the essential message that I said on tape.

Q. Okay. And so did you believe her?

A. Did I believe that I could lose all of my money on [29] this?

Q. That's correct.

A. It's not a question of believing her. Howard came back on the line. I understood when I signed the document that commodities were riskier than stocks or mutual funds.

Q. Okay. So, before you made you [sic] first purchase, you understood that you were involved in a risky investment?

A. Yes.

Q. And you understood what the commission rates were?

A. Yes.

Q. And you understood what the strike price was?

A. Strike price?

Q. You understood what was necessary for you to make money at this investment?

A. Yes.

* * *

[37] BY MR. THOMPSON:

* * *

Q. Okay. And, in fact, when you testified earlier that he said you would triple your money, was that a quote, or was that the way that you felt?

A. That's as close to a quote as I can get, after two years.

Q. Okay. So it could have been "could," as opposed to "would," for instance?

A. Could have been, but I'm almost certain that it was much more positive than a "could."

* * *

[72] CROSS-EXAMINATION

BY MR. THOMPSON:

[Weaver Testimony] Q. Mr. Weaver, if you will, will you go over your prior investments before you met Mr. Miller?

JUDGE PAINTER: Let me inquire, first, had you ever dealt in commodity options, commodity futures contracts, or leverage contracts?

THE WITNESS: Had I ever before?

JUDGE PAINTER: Yes.

THE WITNESS: No.

[73] JUDGE PAINTER: I don't see any need to inquire into other areas, Mr. Thompson.

BY MR. THOMPSON:

Q. Before meeting Mr. Miller; that's the question. Is your answer you've never invested in commodity options?

A. Not to my recollection.

Q. Okay. Isn't it true that in October 1985 you invested with Siegel Trading Company?

A. I do not recall that I did.

Q. If I can show you a document, maybe it will help your memory on that issue.

A. Anything is possible.

Q. So it is possible that you did invest with Siegel?

A. I did a lot of investment.

MS. LARABEE: Objection; he's mischaracterizing the witness' statement. He said that "anything was possible," with regard to whether or not the document would refresh his recollection, not whether he invested.

JUDGE PAINTER: And it is possible that you did invest with Siegel. If he shows you a document that suggests that, you would be able –

THE WITNESS: Yes. I surely don't remember it, but –

MS. LARABEE: Excuse me. Could I please see you've got there?

[74] MR. THOMPSON: Sure, sure.

MS. LARABEE: And do you have a copy of that for us?

MR. THOMPSON: I don't have a copy. I didn't know that this was going to be his testimony.

JUDGE PAINTER: Well, we'll have a copy made by this afternoon, I'm sure. Let's identify that as R1.

(Respondent's Exhibit No. R1 was marked for identification.)

MR. THOMPSON: Yes.

JUDGE PAINTER: Will that mess up your numbering system?

MR. THOMPSON: No.

JUDGE PAINTER: This is R1 you're going to be looking at, Mr. Weaver.

BY MR. THOMPSON:

Q. I'm showing you a document that is a customer account agreement, and if you'll flip through this to the signature page, is this your – do you recognize this signature?

A. That looks like my signature.

Q. On page five of this agreement. Page six, there's another signature. Does that look like yours?

A. Not exactly.

* * *

[78] JUDGE PAINTER: Well, you may find out at a later time. Now, proceed with your examination.

MR. THOMPSON: Thank you, Your Honor.

BY MR. THOMPSON:

Q. Do you recall that on October 3rd, 1985, you purchased through the Siegel Trading Company one December Swiss franc call?

MS. LARABEE: Objection; I'm not sure what the relevance of this was. We've already established this was a different broker.

JUDGE PAINTER: It's a different broker, but Mr. Thompson simply wants it noted on the record that this particular witness had traded prior to the time, and in similar instruments.

MR. THOMPSON: That's correct.

JUDGE PAINTER: And, therefore, if he lost money then, he would be aware of some of the risk, I would assume.

MR. THOMPSON: That's correct.

JUDGE PAINTER: All right. We know that.

MR. THOMPSON: And he did indicate that he had not invested previously.

JUDGE PAINTER: And you did not recall; but you may have invested?

THE WITNESS: I'm sorry. I completely forgot about that, but I'm sure you're right, because I remember the Swiss [79] francs.

BY MR. THOMPSON:

Q. And, on December 17th, you –

A. And that clears up how Howard Miller got ahold of me, because it was through that, which I had forgotten about.

JUDGE PAINTER: All right. Anything else?

MR. THOMPSON: Yes, Your Honor.

BY MR. THOMPSON:

Q. Did you lose money in your 1985 investments?

A. I can't tell you; I don't know.

Q. Sir, what was the date that you informed Mr. Miller that you could not afford to invest anymore?

A. That was probably in –

Q. Do you know for sure?

A. 1989.

* * *

[97] [Barnes Testimony] CROSS-EXAMINATION

BY MR. THOMPSON:

Q. Mr. Barnes, you understood that you could lose money on the investment, did you not?

A. Yes, I did.

Q. And in fact you knew that prior to your investment with the Siegel Trading Company?

A. That's not true.

Q. Pardon?

A. No, that's not true.

Q. You didn't understand that?

A. I did not know that.

Q. Okay. You did receive documents from the Siegel Company, did you not?

A. After I made an investment.

Q. No, did you ever receive customer account agreements, risk disclosure documents, anything for you to sign? What did the messenger bring over to you? Let's talk about that.

A. The very first time?

Q. Yes.

A. Income statement, how much money I made, what my net worth was, financial information.

Q. Okay. That's one document. There were more

[98] documents in that package, weren't there?

A. There must have been three or four documents in that package.

Q. Okay. What other documents were in there?

A. I cannot recall.

Q. Okay. Is it possible that you had a risk disclosure document?

A. I'm sure there is.

Q. Okay. Was it possible that you had a document that explains to you what the commissions are?

A. I'm sure there must have been.

Q. And you signed these documents, did you not?

A. I probably did.

Q. And you forwarded them back over the Siegel Company with the messenger, did you not?

A. Yes, I did.

Q. Okay. And in those documents, did they not inform you what the commission rate was, sir?

MS. LARABEE: Objection.

JUDGE PAINTER: What's the objection?

(No audible response.)

JUDGE PAINTER: Overruled. When you signed these documents, did you recognize then that you could lose your money?

THE WITNESS: No, I did not.

* * *

[101] information, that you told them that you had $20,000 of what you called "mad money" – m-a-d money?

A. I may have.

Q. Does that sound like something that you would say?

A. No, not really. I probably told him I had $20,000 to play with.

Q. "To play with?"

A. Yes, I don't think it's mad money. I don't know what you mean by "mad money."

Q. Okay. Would it surprise you if I told you that that's what you called it, "mad money?" Is that the same thing to you?

A. That would surprise me, because I had never used that term before.

MR. THOMPSON: What I would like to have marked for identification is Respondent's 2. It is a taped telephone conversation with Lloyd L. Barnes. We have the actual tapes, but I think for –

(Respondent's Exhibit No. 2 was marked for identification.)

JUDGE PAINTER: I think you could show it to the witness. You'll probably get a stipulation as to what it says. All right? And that would avoid cluttering the record up with another 150 pages.

MR. THOMPSON: Okay. So you're saying show it –

* * *

[104] the verifier.

MR. THOMPSON: Okay.

JUDGE PAINTER: Very well; next.

BY MR. THOMPSON:

Q. And you understood that to be what, money you could lose?

MS. LARABEE: Objection.

THE WITNESS: Money I could lose.

BY MR. THOMPSON:

Q. Money you could lose?

A. I understood that.

MS. LARABEE: Objection; Mr. Thompson is mischaracterizing what the witness said in response. His own transcript says, "my mad money" with a question mark, not "my mad money" as an affirmation.

MR. THOMPSON: I believe that's clarified here.

JUDGE PAINTER: I think it's very clear to all of us. Let's move on.

BY MR. THOMPSON:

Q. Will you turn to page seven, please, line six?

A. Yes.

Q. And did you not indicate to the verifier that you did understand the risk of loss?

A. Yes, sir.

Q. No, in the document.

[105] MS. LARABEE: Objection.

JUDGE PAINTER: Mr. Thompson, why don't you just read that sentence, and then you ask him, "Did you answer?"

BY MR. THOMPSON:

Q. Okay. At page seven, line seven, did the verifier ask you: "And about our fees and commissions; when you purchased the option through Siegel Trading Company, our commission will be 45 percent of the cost of the option premium, plus a charge of $155 per option. When you sell the option, the charge will be $155 per option, only. Is that clear, sir?"

And did you not answer, "Yes?"

A. Yes.

Q. On page six, line 16, sir, were you not asked by the verifier, "Did you read and understand the" – it says, "them," but they're referring to the documents, and your response was?

A. Most of it, yes.

MS. LARABEE: Objection.

JUDGE PAINTER: What's the objection?

MS. LARABEE: That's not exactly what it says.

JUDGE PAINTER: All right. Read it. Were you asked this question, and did you give this answer? Would you read that for us, Mr. Thompson?

BY MR. THOMPSON:

[106] Q. Yes, okay. Were you asked, "Did you read and understand them?," and you said, "Most of it," and did they respond, "Well, to the best of your ability did you understand the papers?," and your response was, "Yes." Is that true?

A. Yes, to the best of my ability.

MS. LARABEE: Objection; what is the purpose of the – I don't understand the purpose of the line of questioning.

JUDGE PAINTER: It's overruled. Let's go to the next question. Is that about it, Mr. Thompson?

MR. THOMPSON: No, it's not.

BY MR. THOMPSON:

Q. While you were trading through Siegel Trading Company, was Mr. Miller the only broker that you had?

A. No.

Q. Okay. What other broker did you have?

A. I can't recall his name.

Q. Okay. Was it before Mr. Miller or after Mr. Miller?

A. After Mr. Miller.

Q. Do you remember which year it was?

A. I believe it was late '90

Q. I'm sorry?

A. I believe it was late '90. I think Mr. Miller got ill or something, and someone took over for him.

* * *

[118] Q. And do you remember approximately when that was?

A. Either the end of '87, or the beginning of '88, to the end of '88, beginning of '89.

Q. And how did you come in contact with him?

A. He called me on the phone.

Q. Prior to that time, had you spoken to Mr. Miller?

A. No, ma'am.

Q. Now, prior to speaking with Mr. Miller, had you dealt with anyone at Siegel Trading Company before?

A. Yes, I had.

Q. And could you tell us about that experience?

A. I was contacted by a person from Siegel Trading, which I don't recall their name, asking me to invest in T-bills or T-bonds. It sounded like a legitimate investment, so I invested, and lost all the money that I invested.

* * *

[129] Q. I see. Did you have any problems with that particular broker?

A. That's what happened, was this was – the investment was made starting with her, or with somebody else, and I was transferred to Howard Miller during that period of time. They told me that he was taking over the account.

Q. I see. Did that particular broker explain to you the risk involved in trading commodity options?

A. No, not specifically.

Q. Okay. Do you recall being tape-recorded prior to making your first investment with Siegel?

A. Not prior; always after. After you agreed to it, as soon as you said yes, then you were immediately transferred to somebody who would record, and ask you a series of questions, like, "Do you know that this is a risk, and there's a limited risk?," and you would answer those questions.

Q. Okay. So that did happen with your first broker?

A. Yes.

Q. Okay. And your first transaction, do you recall what you purchased?

A. No, I don't.

Q. Okay. And when they asked you, did you understand that there is a risk, you answered, "Yes," did you not?

A. Yes.

[130] Q. Okay. And you understood the commissions at that time?

A. No.

Q. Okay. But it was explained to you?

A. They tried to explain it to me.

Q. Okay. And after their explanation, you did understand that you were charged 45 percent commissions, right, plus $155?

A. Right.

Q. Okay.

A. Well, I mean, I saw it on my account.

Q. Okay. Did you also see it in the customer account agreement, right above your signature?

A. Customer account agreement?

Q. Those are the documents that the Siegel personnel probably walked you through.

A. I don't recall those.

Q. Okay. Is it possible that you did – you did sign a customer account agreement, right, in order to open your account?

A. That may have been the first encounter; that's why they came to the office. I recall there were some documents that I had to sign.

Q. Okay. And this was before you met Mr. Miller?

A. Yes.

[131] Q. Okay. And you did sign those documents?

A. Yes. I mean, I believe I did, if they required it.

Q. Sure. And you read it; correct?

A. Yes, I believe I read it. I wouldn't have signed it, if I didn't read it.

Q. Okay. Fine. Then you mailed it, or you gave it to the messenger, who eventually took it back to Siegel?

A. Right. I believe the messenger was waiting for me to read them over and sign it. They were sitting in my office waiting for it.

Q. Okay. And then, at some point, you got a call from some other person, not your broker, at Siegel, who went over your investment; is that correct?

A. To the best of my knowledge, yes.

Q. Okay. And they asked you questions about if you could afford – "Can you afford this loss?," if you were going to lose, and you responded that you could?

A. Yes.

Q. Okay. Then, at some point, you met Mr. Miller; correct?

A. Yes, through the telephone.

Q. Okay. And Mr. Miller told you, after telling you about the investment opportunity available, he told you, did he not, that you could, if the market goes against your position, you could lose?

[132] A. Howard Miller never said anything like that to me, that I recall. He was always very positive that this

was a winner. If he wasn't, then I wouldn't have gone with it, and I wouldn't have put the money into it.

Q. Okay. And, once again, when you ordered a position, eventually you talked to some other person at Siegel, who tape-recorded you; correct?

A. Yes, and I was told that that was a formality, and that that's why they were doing it, because they said it was required.

Q. Okay. At the time you met Mr. Miller, you already understood that you can lose; correct?

A. Yes.

Q. Okay. And at the time that you met Mr. Miller, you already understood that commissions were 45 percent?

A. It was on my papers, yes.

Q. Yes. And at the time that you met Mr. Miller, you also understood that whether you made money or lost money on the investment would be controlled by market conditions; correct?

A. The market conditions would have to be right; that's true.

Q. Okay. And Mr. Miller didn't tell you anything different from that?

A. He indicated that the market conditions were right.

* * *

[154] [Timmons Testimony] Q. Okay. And you indicated that you knew that options had more risk than stocks?

A. Yes.

Q. And how did you know that?

A. General knowledge of life. Like I said, I knew that before buying.

Q. Okay. Did Mr. Miller indicate to you which of his customers was making money while you were losing, and on which – excuse me. Let me stop there, first, and have you respond to that.

A. Well, after that one call about an Ed Timmerman, it sounded like he was doing pretty well.

Q. And that's the limit of –

A. That's the one, and then these two ranchers that bought cattle all the time, just before the 4th of July holiday. They seemed to do well, you know. Those were the people he alluded to that I can remember specific accounts relating to.

Q. You knew what the commissions were before you met Mr. Miller, the commission on your –

A. Before I met him, no, sir; I didn't.

* * *

[178] [Friery Testimony] Q. Ms. Friery, you'll have to excuse some of my questions. I'm not that good at reading charts, but would it be fair to say that Mr. Miller's performance with his particular customers at Siegel was

better than Siegel's performance with their customers, during the dates that are reflected in Exhibit 11?

A. Well, that is true, if you look at attachment number 11. That is the performance for the entire Siegel Trading Company, and the comparable chart for Mr. Miller is number two.

Q. Okay. Now, in your pursuits, did you have the opportunity to pull up the same type of data on other brokers at Siegel, the way that you have here with Mr. Miller?

A. I did not do that.

Q. Okay. So you wouldn't know whether Mr. Miller outperformed other brokers at Siegel, or not?

A. No, I don't.

JUDGE PAINTER: I think we can make that inference, though, Mr. Thompson. He did better than the average broker, didn't he?

MR. THOMPSON: Well, that's the average broker, Your Honor; I mean every broker. But she indicated that she couldn't testify to that.

BY MR. THOMPSON:

Q. When was this chart created by you?

[179] A. When did I create this? Actually, fairly recently. I think it was pretty much in this form (indicating) when we had the last hearing scheduled, whenever that was; I can't remember. I put it in these booklets just last week.

Q. Is it possible that, at one time or another, each of Mr. Miller's clients or customers would have had a profit on a trade position? I mean, can you tell that by this exhibit?

A. What this tells me – the data from ADP tells me, as to any given date, what the status of the account is. That is, for example, at the end of December it will tell me what the commissions were for the period, usually a year, ending at that time, the commissions and trading losses, and then the overall losses. So I cannot see individual trades in this data, if that's what you're asking me.

* * *

UNITED STATES OF AMERICA
BEFORE THE
COMMODITY FUTURES TRADING COMMISSION

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|---|---|---|
| In the Matter of | : | |
| HOWARD MILLER | : | CFTC Docket No. 92-4 |
| Respondent. | : | |

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VOLUME II

Thursday, November 4, 1993

World Trade Center
350 South Figueroa Street
Room 310A
Los Angeles, California

The HEARING in the above-entitled matter commenced pursuant to notice, at 8:00 a.m.

BEFORE: GEORGE H. PAINTER
Administrative Law Judge
Office of Proceedings
Commodity Futures Trading Commission
2000 L Street, N.W., Suite 620
Washington, DC 20036

APPEARANCES: *On Behalf of the Commodity Futures Trading Commission*:

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* * *

[199] [Cowan Testimony] CROSS-EXAMINATION

BY MR. THOMPSON:

Q. Mr. Cowan, my name is Robert Thompson, and I'm representing Howard Miller in this matter. I wanted to go over some of your testimony.

A. Sure.

Q. You indicated that you contacted another brokerage house, after your first purchase?

A. Yes.

Q. Which brokerage house is that?

A. It was Shearson, Lehman.

Q. Okay. And you asked them about their commission charge?

A. What I asked them about is, I talked to them about the copper. It was a put, I believe, and I asked them, whoever, about what was going on with the copper put, and if copper was going to go up, or if copper was going to go down, and he was not really sure which way it was going to go, and I asked him, "Well, what is your cost for a put?" And that was our conversation.

[200] Q. And the reason you made this call is because you knew that the commission charges that you were being assessed at Siegel Trading Company was higher?

THE WITNESS: No.

MS. LARABEE: Objection. He hasn't –

JUDGE PAINTER: I didn't hear that testimony. Why did you?

THE WITNESS: I'm just a shopper.

BY MR. THOMPSON:

Q. Okay. So you did shop?

A. What I did was I called somebody else and said, "Hey, what's going on?," and that's when I asked Howard, after that, about the commission there, why was this person's charge $1,050 and his was so much more? And that's when we got in the conversation of the research and development of Siegel Trading.

Q. Okay. So, at the time that you called Shearson, Lehman, you were aware of the commission charges at the Siegel Company?

A. I don't know if you'd call them commission charges, or charges. Okay? I mean, what you're asking me is, did I know there was a purchase price for an option, and so much is commission; no. What I knew is that that's what Siegel Trading charged, and that's what a competitor charged, and the reason Siegel Trading charged so much was because of [201] research and development. It was never explained to me that it was a commission charge.

Q. Okay. And this conversation was after your first purchase?

A. After first purchase.

Q Was it before the verification of your first purchase, where you were tape-recorded?

A. No. It was after that.

Q. It was after that. Okay. So is it your testimony that you were not advised of the commission charges, during your first taped verification?

A. Correct.

Q. "Correct," you were not advised?

A. I was not advised.

Q. And you're sure of that?

A. To my knowledge, now, I was not.

Q. Are you just as sure of that as you are of your testimony that Mr. Miller did not explain the commission charges to you?

A. Yes.

Q. Okay. Explain the third purchase of the copper position, please.

A. The third purchase was insurance.

Q. What do you mean, "insurance?"

A. That's what Howard said, "It's insurance."

* * *

[207] Is that correct?

A. Yes.

Q. I'm sorry. Okay. I'm at page seven. And then they say, "All right. What I'd like to do for you is," and your response is, "This is high-risk money. I know that." You don't recall that?

A. No.

Q. Now, you haven't indicated today that there were any guarantees made to you by Mr. Miller, have you?

A. He never said the word guarantee, but he implied two- to threefold increase of my money.

Q. And you accepted that as a guarantee?

A. Yes.

Q. Okay. Do you recall telling the verifier, after your first transaction, that there were no guarantees made to you?

A. Did he ask me if there was guarantees?

Q. At page five of this transcript; this is a transcript of a tape-recording of your verification process.

MS. LARABEE: Objection.

JUDGE PAINTER: Grounds?

MS. LARABEE: We have no basis for knowing that this is an accurate transcript. We haven't seen it, and we've just received this, just now.

JUDGE PAINTER: Well, overruled. You're [208] representing that's a true and correct transcript of the tape?

MR. THOMPSON: Certainly, your Honor.

JUDGE PAINTER: You could provide –

MR. THOMPSON: I could and will provide the tape, your Honor.

BY MR. THOMPSON:

Q. Starting at page five, the question is, "All right. Before I get into that, let me ask you, has anyone promised you or guaranteed you anything regarding profit or loss?" And the answer is, "No. Yeah, they said the most I could lose was my money I put up." Now do you recall saying that to the verifier?

A. No, but I don't doubt that I may have said it. Okay?

Q. Okay. Now, you just testified before this Court that you did not understand the commission charges until you contacted another brokerage house?

A. Correct.

Q. Which was Shearson, Lehman?

A. I believe it was Shearson, Lehman.

Q. By the way, did you have an account there?

A. Yes.

Q. And what kind of account did you have, sir?

A. I have a KEOGH and an IRA.

* * *

[213] MR. THOMPSON: Four.

JUDGE PAINTER: R4; R4 is admitted.

(Respondent's Exhibit No. 4 was marked for identification and received in evidence.)

MR. THOMPSON: Yes, with the –

JUDGE PAINTER: With the condition –

MR. THOMPSON: The cassette should also be along with this, just for the Court's purposes.

JUDGE PAINTER: Furnish the cassette to Ms. Larabee; then it won't get lost.

Does that conclude the examination, Mr. Thompson?

MR. THOMPSON: One more question, your Honor.

BY MR. THOMPSON:

Q. You talked about doubling your money, or tripling your money. Was it doubling or tripling?

A. In my mind, I was supposed to have $33,000 at the end of my options.

Q. Okay. That was a possibility. That was what you were aspiring for?

A. Correct. That's what –

Q. Yes. That was no guarantee; it was just that that is why you invested. That's what you were going for?

A. Right.

* * *

UNITED STATES OF AMERICA
BEFORE THE
COMMODITY FUTURES TRADING COMMISSION

| | | |
|---|---|---|
| In the Matter of: | : | |
| HOWARD MILLER | : | CFTC Docket No. 92-4 |
| Respondent. | : | |

VOLUME III

Tuesday, November 23, 1993

World Trade Center
350 South Figueroa Street
Room 310A
Los Angeles, California

(Filed Dec. 9, 1993)

The HEARING in the above-entitled matter commenced pursuant to notice, at 8:56 a.m

BEFORE: GEORGE H. PAINTER
Administrative Law Judge
Office of Proceedings
Commodity Futures Trading Commission
2000 L Street, N.W., Suite 620
Washington, DC 20036

APPEARANCES: *On Behalf of the Commodity Futures Trading Commission*:

JENNIFER LARABEE, ESQ.
LOUIS V. TRAEGER, ESQ.
Commodity Futures Trading Commission
Division of Enforcement
Murdock Plaza, Suite 400
10900 Wilshire Boulevard
Los Angeles, California 90024
(310) 575-6783

* * *

[239] [Black Testimony] Q. Do you recall what, if anything, Miller said about the risk of losing your money?

A. The risk would be limited to the amount that you invested. That there was no further capital required than the initial purchase price, and that that would be the most that you could lose which almost never happens because they monitor them on a daily basis and if the value is going down, then you sell.

Q. And with regard to monitoring on a daily basis, did Mr. Miller say anything to you about why they were monitored on a daily basis?

A. To sell at the maximum profit time at the point that the value was at its greatest.

Q. Do you recall what, if anything, Mr. Miller said to you about whether or not he had invested in the commodities he recommended?

A. Oh, yes, he said on most occasions that he was buying such and such a quantity of this for himself and that he invested in almost all of the ones that he recommended.

Q. And do you recall anything – what, if anything, Mr. Miller said to you about the worst case scenario as to losing your money, if you purchase an option?

MR. THOMPSON: Your Honor, once again I'm going to object on the basis that it is a leading question. She's putting words in the witness' mouth.

* * *

[249] Q. He didn't tell you anything else about it? He just told you that you're going to be taped to have a record of your transactions, correct?

A. Well, the reason for the taping was a record of the transaction.

Q. Okay, thank you.

A. It was a formality.

Q. Thank you.

A. Yes.

Q. He didn't tell you to ignore anything that was going to be discussed during the taping?

A. No.

Q. Okay. Right below that it says "Did anything said during the taping procedure contradict what you were previously told?" And your response in this Exhibit is "No." That's still your testimony today is it not?

A. That's correct.

Q. Below that it says, "Did the broker tell you to ignore the contradictions because the taping was merely a formality?" and you responded "No", did you not?

A. That's correct.

[250] Q. And that's true?

A. That's correct.

Q. Number 22 asked, "Did the broker ask you to disclose your income and your net worth prior to your purchase?" And you answered "Yes", and that's true?

A. That's correct.

Q. And it also asks, if yes, "Did he suggest that you modify or change these figures?" You answered "No".

A. That's correct.

Q. And that's true today, correct?

A. Yes.

Q. And Mr. Miller did inform you that you could lose your investment?

A. Yes.

Q. You understood that?

A. Yes.

Q. Turning your attention to 21-4 again, under Number 25 on that page there's a question of how much did you invest and at that time. At the time of filling out this form you I indicated $17,692, is that correct?

A. That's correct.

Q. And you indicate that's between October '87 to September '88.

A. Yes.

Q. That's correct?

[251] A. Right.

Q. Prior to your first purchase of an option position through the Siegel Trading Company, I believe you testified that Mr. Miller described to you the paperwork that he would be sending to you, the documents?

MS. LARABEE: Objection, I don't recall any testimony of the witness saying that he described the paperwork.

MR. THOMPSON: Strike that. I'll rephrase it, Your Honor.

BY MR. THOMPSON:

Q. Did Mr. Miller indicate to you that he would be sending you documents for your review and signature?

A. Yes.

Q. Did he tell you what type of documents you would be receiving?

A. Yes.

Q. And you ultimately received documents that had been described by Mr. Miller?

A. Yes.

Q. When you received the documents from Mr. Miller, did anything – was there anything in the documents that were presented to you for signature that were different than what Mr. Miller had told you that you would be receiving?

A. I don't understand your question.

* * *

[254] JUDGE PAINTER The point – the testimony is that the messenger was there three minutes. You've never seen the documents before, and you signed where indicated and gave the messenger the documents and the check?

THE WITNESS: Exactly.

BY MR. THOMPSON:

Q. Okay. Did you talk to Mr. Miller at any time while the messenger was present?

A. No.

Q. Okay. And is it your testimony that at the time that you signed the documents you did not understand what the commission rates were?

A. That's correct.

Q. And is it your testimony that at the time that you signed the documents you did not know that you bore the risk of losing your investment?

A. What was that again?

Q. You understood at the time that you signed the documents that you could lose your investment?

A. Yes.

Q. Okay. And that's because Mr. Miller had told you that?

A. Yes.

Q. Do you recall being tape-recorded shortly after you sent your money in to Siegel Trading Company?

[255] A. The next day I got a phone call that was tape-recorded from Siegel, yes.

JUDGE PAINTER: If it would save time, I think if we get the Division to stipulate that these taped conversations say what they say and they would be very happy to

take those in evidence, Mr. Thompson, it would just help move things along. I don't think anyone's going to quarrel with those taped confirmation –

MS. LARABEE: Your Honor, while I have no objections to the taped conversations, I have gone through some of the tapes and have found on at least one of them from the last period that apparently the person who transcribed it put it in chronological order when – I guess when Siegel taped it, it wasn't in chronological order –

JUDGE PAINTER: That's no big problem, though. I think we can all pretty well accept the fact that there was a confirmation conversation –

MS. LARABEE: Yes, Your Honor.

JUDGE PAINTER: After an agreement to purchase an option, there was a set list of questions read to the customer. The customer said yes, yes, yes, yes, is that correct?

THE WITNESS: Yes, to the best of my recollection that's –

JUDGE PAINTER: Indicating that you could lose all [256] your – lose your investments?

THE WITNESS: Yes.

JUDGE PAINTER: So it might save some time – there's no point in your wanting to hear about things where there are no issues.

MR. THOMPSON: Okay, Your Honor. What I would like to do with the Court's permission, then, is to – well one, is, are the Court's instruction the same on – as to the customer account documents that –

JUDGE PAINTER: I see no problem with me taking the – is there an issue concerning the account documents, Mr. Thompson? Why burden the record if there's no issue on that point?

MR. THOMPSON: Well, –

JUDGE PAINTER: Is there an issue there that you see on the account opening documents?

MR. THOMPSON: Well, sure, this gentleman indicated that –

JUDGE PAINTER: Just a minute.

MR. THOMPSON: Okay.

JUDGE PAINTER: You have no objections, right, Ms. Larabee?

MS. LARABEE: No.

JUDGE PAINTER: Those are Mr. Black's accounts opening documents?

[257] MR. THOMPSON: Yes, and I would like to mark the Respondent's Number 5.

JUDGE PAINTER: R-5 is what?

MR. THOMPSON: R-5 is a Customer Agreement and Account Opening Documents.

JUDGE PAINTER: Account Opening Documents, and the Risk Disclosure Statement.

MR. THOMPSON: Yes, and the Risk Disclosure Statement.

JUDGE PAINTER: R-5 is admitted.

(Respondent's Exhibit No. 5 was marked for identification and was received in evidence.)

MR. THOMPSON: Thank you, Your Honor.

JUDGE PAINTER: Do you have the conversation now, you want that in?

MR. THOMPSON: Yes, R-6 is the taped telephone conversations with Ken Black.

JUDGE PAINTER: Again, what I'm trying to tell you is, you're buying this back when you buy this transcript, and I don't see an issue in this except you wanted to show in black and white that these – this was asked, and this was answered.

MR. THOMPSON: That's right.

JUDGE PAINTER: Okay.

[258] MR. THOMPSON: And that the responses given at that – this time were different than the responses to questions during testimony.

JUDGE PAINTER: All right, what's the number?

MR. THOMPSON: This will be Respondent 6.

JUDGE PAINTER: R-6. Any objection to R-6?

MR. TRAEGER: Is that the transcript?

MR. THOMPSON: Yes, it is.

JUDGE PAINTER: Transcript of the confirmation – taped confirmations statement.

MS. LARABEE: No objection.

MR. TRAEGER: The same representation.

JUDGE PAINTER: R-6?

MR. TRAEGER: Yes.

JUDGE PAINTER: R-6 is admitted.

(Respondent's Exhibit No. 6 was marked for identification and was received in evidence.)

JUDGE PAINTER: Anything else of this witness, Mr. Thompson?

MR. THOMPSON: Pardon? I'm sorry.

JUDGE PAINTER: Do you have anything else of this witness?

MR. THOMPSON: Yes, Your Honor, if I can have a moment, please.

[259] (Pause.)

BY MR. THOMPSON:

Q. Mr. Black, Mr. Miller did not guarantee you that you would double or triple your money if you invested in this – any one of these options did he?

A. Guarantee it?

Q. Yes.

A. No.

Q. Okay. You testified earlier that Mr. Miller, although you understood that you could lose your total investment, there was some representation that it almost never happens. Was he talking about a particular investment or particular option?

A. Well, no, not a particular one, all of them in general.

Q. And when you went through your taped verification, did you bring that up, did you discuss that, that it hardly ever happens, losing your entire –

A. No.

Q. Okay. And you don't recall anyone during the verification process telling you that – making that same representation, correct?

A. The verification process, which is what?

Q. The taped conversations – I'm saying right now today, you don't recall anyone during that taped conversation [260] telling you that hardly ever –

A. No, no.

Q. Okay – hardly anyone loses their investment?

A. Well, I don't think the terminology was "anyone," "it never happens" was the terminology.

Q. Okay. It never happens?

A. It doesn't – doesn't happen because that's what they do, is monitor so that you don't –

Q. Okay, but it wasn't told to you during the verification process?

A. No, not on the tape, no.

Q. Okay. It's not your testimony that Mr. Miller ever told you he was an expert in recommending commodity options, is it? He didn't tell you that?

A. You mean the exact word that he was an expert?

Q. Yes.

A. No, I don't think he ever – I can't say for sure that he used that exact word, but he led me to believe that, yes.

Q. Okay, but not by describing himself?

A. But by describing his experience in the business.

Q. Okay.

A. And the research staff behind him.

MR. THOMPSON: No more questions, Your Honor.

JUDGE PAINTER: One or two questions from me then.

* * *

[264] JUDGE PAINTER: Maybe you'd better spell your name for the court reporter too.

THE WITNESS: Okay, excuse me. My first name is Ellen, E-l-l-e-n. My last name Slobin, S-l-o-b-i-n.

DIRECT EXAMINATION

* * *

[267] Q. And can you explain to the Court what your job was – your tasks were while employed?

A. Well, I supervised the verification of orders and the verification of the monthly statements.

JUDGE PAINTER: Would you tell me what issue in this case this testimony relates to Mr. Thompson?

What part of the complaint? You have a copy of the complaint there, right?

MR. THOMPSON: The representations, Your Honor, that some of the investors have indicated were made by Mr. Miller were in contradiction with the verifications. Ms. Slobin is the manager of the Verification Department. I believe that it's relevant to this proceeding for the Court to understand what the verification process is –

JUDGE PAINTER: I don't think there's a doubt in my mind or your mind or Ms. Larabee's mind as to what this verification procedure is. I don't think there's any doubt at all. I think when a customer makes his – talks to the salesman, there is then a verification procedure through someone other than the salesman, it is taped, and we have that conversation here. There's no possible dispute concerning that. So why do we need this, what's the relevance?

* * *

[275] [Martin Testimony] Q. Okay. And then would you stay in that area – were you in the same area as Mr. Miller at that time?

A. No, I was not.

Q. Okay. Was there a time when you were in the same area?

A. I received my license and I would contact the customers and give them like information on what they purchased or give them updates to a point and that was about it.

Q. Were there times when you sat next to Mr. Miller during his conversations with various investors?

A. Yes, I did all the time.

Q. All the time?

A. All the time.

Q. In your proximity to Mr. Miller were you able to hear his conversations with different customers?

A. Yes, I was.

Q. You've heard a lot of testimony of over the last few days regarding certain representations either Mr. Miller made or didn't make, and I'd like to ask you about some of those at this time.

In the conversations that you would hear, did Mr. Miller discuss the risk to different customers?

A. Yes, he did, always.

MR. TRAEGER: Objection. Irrelevant.

[276] JUDGE PAINTER: Well, I think we can hear that, go ahead.

BY MR. THOMPSON:

A. He did always?

MR. TRAEGER: I object as a conclusion of this witness, Your Honor.

JUDGE PAINTER: Well, you find out on your cross what kind of risks were disclosed then.

MR. TRAEGER: All right.

JUDGE PAINTER: Proceed.

MR. THOMPSON: Thank you, Your Honor.

BY MR. THOMPSON:

Q. During these conversations that Mr. Miller would have with either prospective customers or customers would there be a discussion of commissions?

A. Yes, there were.

Q. Was that sometimes or –

A. No, always.

Q. Have you ever heard Mr. Miller guarantee the success of an investment or a purchase with to customer?

A. No, never.

JUDGE PAINTER: Could I ask the witness to speak a little closer to the microphone.

THE WITNESS: Oh, I'm sorry.

JUDGE PAINTER: Thank you.

[277] BY MR. THOMPSON:

Q. To the best of your ability can you describe to the Court the procedure that would be utilized between Mr. Miller and the customer when Mr. Miller – when the customer decided to purchase a position?

A. At the very beginning?

Q. At the very beginning.

A. He would go over all the paperwork them. He would talk to them about the position that he would be purchasing. He would read them various reports stating what he believed in as why he was asking them to purchase a position.

He would go over the commissions, any risks involved, going over break-even points and when we would set up for them to go out for a messenger service to the customers.

At the point that the messenger got to the customer, he would then call in and Howard would once again go over all the paperwork with him. If the customer had any questions and – Howard would answer all the question for him.

Q. Now, the cost of the messenger, whose cost was that?

A. Howard's.

Q. Was there a reason that the – that Mr. Miller reviewed the documentation with the client – with the [278] customer twice?

MR. TRAEGER: I object. It calls for a conclusion, Your Honor.

JUDGE PAINTER: Restate the question.

MR. THOMPSON: Yes, Your Honor.

BY MR. THOMPSON:

Q. I believe your testimony was that Mr. Miller would discuss the paperwork with the customer on two different occasions?

A. Yes, that's true.

Q. Was there a reason for that?

A. Because if the customer wasn't fully informed of what papers he was signing and we sent the messenger

out there and the customer didn't open an account, it would still cost Mr. Miller the messenger service, and, therefore, it was pointless to send somebody out to just run up the charges for the messenger service.

Q. Okay. If you know, what would happen if a customer was contacted by the Compliance Department and was confused on what the risks were?

MR. TRAEGER: Objection. It's speculation.

JUDGE PAINTER: Can you answer the question?

THE WITNESS: Sure. As in the Compliance Department, as in the back office that took over?

MR. THOMPSON: Yes.

[279] THE WITNESS: The call would be given back to Mr. Miller and Mr. Miller would then again explain everything, go over a little bit further, answer further questions in more detail.

BY MR. THOMPSON:

Q. Is that another reason that Mr. Miller would discuss these contracts or the Customer Account Agreements more than once?

A. Yes, absolutely. It would be turned back to him if it wasn't and he wanted to make sure that they understood everything before it went to the back office for taping.

Q. Now, during your association with Mr. Miller have you ever known him to make a loan or offer a loan to a customer?

A. No, I have never.

Q. All right. Is that something that you think he would do?

A. No, no.

Q. Have you ever heard Mr. Miller tell a customer that 80 percent of his customers win?

A. No, that would be the opposite.

Q. What do you mean by that?

A. Howard used to tell them that 85 or 80 percent of the customers lose in commodities.

* * *

[302] [Miller Testimony] Q. Do you remember those particular customers?

A. Vaguely, yes.

Q. Okay. Now, of course, there were different representations that were made during the Division's case in chief and you were present during some of those, correct?

A. Yes, I was.

Q. Have you ever guaranteed profits?

A. Never, ever.

Q. Well, there was testimony that you did guarantee double or triple profits.

A. Never, ever would I guarantee –

JUDGE PAINTER: I'm a little uncertain about your – what the record says, Mr. Thompson. You're using

the word "guarantee" and I have trouble with that. I can't place that with a single witness. Go ahead.

MR. THOMPSON: Okay.

JUDGE PAINTER: I just don't hear it that way.

MR. THOMPSON: Okay.

BY MR. THOMPSON:

Q. Did you at any time tell any investor that they could double or triple their money?

A. No, I did not, sir.

Q. Can you explain to the Court your procedure when a customer decided that he wanted to make a purchase of an [303] option contract?

A. The first thing I would do is I would be go over all the account papers with the customer before I sent them out. I would explain that it was an option and not a future contract. I would then explain to them by being an option their risk was limited to the dollars they put up and not a cent more, that Siegel's commissions were 45 percent and $155 going in and $155 going out.

And after I explained everything to them, I went through what the arbitration was, I went through the questionnaire where he'd have to fill out his name, address, phone number and all that thing, and I would go through everything where, if there was a course of action, where it would be. Everything – I don't remember what the account papers were now, but every page of the account paper I would go over.

At that time, if they understood it, I'd ask them, should I send the account papers out? At that time if they said yes, I would send out the account papers to the client with an understanding that when he got the papers, before he filled them out, he would call me so I could go through them again to make sure he signs and understands each page. Then, if I was not at the office, I always gave him my home number where he could reach me and I would be sure to be at home to make sure that these papers were filled out completely.

[304] Then, I would wait until the papers came back, either that day or the next day. I then would call the customers and tell them we are going to tape the conversation of everything I told them. If there's anything that he didn't understand, to let me know, and if I can't clarify it, I would like to give him his money back. And that's how I did it.

Q. And did anyone ever ask for their money back?

A. Yes, Mr. Scully. I wasn't at the office at the time, but I was relayed the message the next day that Mr. Scully did not understand certain points. They went through it again with him, and the manager, Mr. Jim Lane at that time, went through the points and offered him his money back and he said no, put the trade in. The next day before I put the trade in, because the market was closed, I called Mr. Scully and I asked him if there were any problems – Mr. Lane went through everything and if he was unhappy, I'd like to give him his money back. He said no, I understand everything, and that was it. Outside of him, if there was a client that wanted their money back and said he didn't understand it, Siegel would send their money back immediately.

Q. Was it your procedure always to explain the risk of loss to customers?

A. Definitely. I would not put a customer in the [305] market without explaining that he could lose all the money. It's a highly speculative situation.

Q. Have you ever offered to loan a customer money?

A. No, no I didn't. That's ridiculous.

Q. Did you ever tell a customer that 80 percent of your clients were making money?

A. No, I didn't. I always said just the opposite, 80 to 85 percent of the people that play commodities could lose their money, and the stock answer they would give me, well, 20 percent make money, I could make money, can't I? And I'd say yes.

MR. THOMPSON: No more questions, Your Honor.

MS. LARABEE: Mr. Miller, my name is Jennifer Larabee. I represent the Division in this proceeding, I believe we've met before.

MR. MILLER: Yes, ma'am.

CROSS-EXAMINATION

BY MS. LARABEE:

Q. Now, you've testified that you always told customers that 80 percent of people investing in commodities lost money, is that correct?

A. That is correct.

Q. And when did you start telling customers this?

A. I started to tell customers that about 1985 or '86.

Q. 1985.

* * *

UNITED STATES OF AMERICA
BEFORE THE
COMMODITY FUTURES TRADING COMMISSION

| | | |
|---|---|---|
| In the Matter of: | : | |
| HOWARD MILLER | : | CFTC Docket No. 92-4 |
| Respondent. | : | |

Tuesday, January 25, 1996

U.S. Bankruptcy Court
Courtroom 1439
225 East Temple Street
Los Angeles, CA 90012

The HEARING in the above-entitled matter commenced pursuant to notice, at 8:54 a.m

BEFORE: GEORGE PAINTER
Administrative Law Judge
Office of Proceedings
Commodity Futures Trading Commission
2000 L Street, N.W., Suite 620
Washington, DC 20036

* * *

[28] [Miller Testimony] BY MR. TRAEGER:

Q. Can you generally characterize the nature of the documents that you brought in, sir?

A. Number one, I brought my loan number on Countrywide property that I no longer own. It's owned by my wife and my two children, so it's transferred over. There's a letter here to the Miller Family Trust. May I read it?

Q. Well, sir, when was that transferred?

A. On February 1st, 1993 because of my recent –

Q. Okay. Excuse me, sir. All right.

What other documents did you bring in?

A. Okay. A letter that I do not own M and B Trading. Because of illness, I resigned and sold out to my partner September 1st, 1995.

Q. Okay. And how much did you sell it for?

A. I sold it for three – $3,000 a month payments, commencing October 16th, for one year. There wasn't –

[29] Q. Are there – are there any written documents showing that, sir?

A. Yes, there is, sir.

Q. There's no piece of paper. Has anything been filed with the Secretary of State of the State of California?

A. I really don't know if he had filed or not.

Q. Well, you're listed as the president of that entity; is that correct, sir?

A. At one time I was.

Q. And you're still listed?

A. I should not be on account I have sold out. I do not own it.

Q. Now you brought – okay. What other documents did you bring?

A. Okay. I brought all my Family Trust, IRA, account numbers, where they're located and everything else and the amounts that are in there. I brought my life insurance that I have with the life insurance number. I brought my life insurance that was closed because a lack of pay –

Q. What other types of documents? We're trying to go through and find out what the types of documents are that you brought with you today.

A. I've got everybody I owe money to, with the loan numbers on them.

Q. Okay. What other documents?

* * *

[36] JUDGE PAINTER: All right. Any more questions of Mr. Miller?

MR. TRAEGER: Yes. I do have questions of Mr. Miller.

JUDGE PAINTER: Mr. Miller.

THE WITNESS: Yes, sir.

BY MR. TRAEGER:

Q. Mr. Miller, did you buy any real property in the year 1989 or '90?

A. In 1989 I did purchase my condo.

Q. And how much did you pay for it?

A. We paid two hundred – no, 335,000, I believe.

Q. And how much cash did you put down?

A. I put down at that time, I believe, 70,000 cash.

Q. Did you bring any documents with you concerning that?

A. No, I did not, sir.

Q. Now at some point in time you transferred this property?

A. Yes, I did, sir.

Q. What year was that?

A. In 1993 after my stroke –

Q. You just tell us the year.

A. It did not – it was not legally transferred. I gave a –

[37] Q. Okay. We're just asking you if it was transferred and what year it was transferred?

A. February 1st, 1993 I gave authorization for the property to be given to my wife and my two children –

Q. It was transferred –

A. – because of my stroke.

Q. Okay. Now –

JUDGE PAINTER: That's not the way I heard his answer. You authorized it to be transferred?

THE WITNESS: I gave them the property.

JUDGE PAINTER: Okay.

BY MR. TRAEGER:

Q. But you continue to live in it and you continue to make the payments?

A. Yes, I do. As long as I'm working or was earning money I could.

Q. Are you working now?

A. No, I am not.

Q. So how do you make payments on the property?

A. How? I get my $3,000 a month from Allen Bader. My wife gets a pension of five hundred a month and five hundred Social Security. And I'm going to have to go back to work, but physically I haven't been able to work because of the harassments that's being done to me.

Q. All right. Well, let – just listen to my question

* * *

[41] Do you now own any other real property or property of any kind?

A. None.

Q. Did you transfer in the past two years any property of any kind?

A. I had none to transfer.

Q. What is the value of any Koegh plan or IRA that you have?

A. I have the figures right here.

I had an Oppenheimer for $3,500, which is all listed under my Family Trust. I have a Home Savings account of forty thousand –

Q. Okay. Listen to my questions, before we get into the bank –

A. I'm giving you the answer.

Q. Just listen. I was asking for IRAs or pension plans.

Do you have any IRAs or pension plans?

JUDGE PAINTER: I think that's his –

THE WITNESS: Of my own?

JUDGE PAINTER: That's his answer.

THE WITNESS: None.

MR. TRAEGER: Okay.

BY MR. TRAEGER:

Q. And you have money in the bank?

* * *

[47] A. Okay.

MR. THOMPSON: And I would like to show it to the Court, if I may.

BY MR. THOMPSON:

Q. And can you inform the Court what you thought you were doing by writing this letter?

A. Well, –

Q. First, let me ask you: The date that's indicated on the letter, is that the date that the letter was written and signed?

A. Yes, it was.

Q. What is it that you thought you were doing when you wrote the letter?

A. Well, in – at the end of '92, the first week in '93, I woke up in the hospital with a stroke. And I didn't get out, I believe, until – if my memory serves me, or close to it – about the 20th of January. And I was informed that I would have to have a – a series of angioplasties, because of my stroke, to open up my arteries and possible – another bypass.

And I felt that my children and my wife should have that property. And I gave them everything I had. And since then I've been living on – to answer his question how I pay rent and everything, I have a list of all the money I've borrowed over the last three years to live on, on account of

* * *

[49] Q. At M and B.

A. We had to pay rent –

MR. TRAEGER: Well, I would object as to the relevant –

BY MR. THOMPSON:

Q. And how much –

JUDGE PAINTER: He has a – you can't just take his gross and say that that was all going into his pocket. That's – I don't know how you're dividing it up with your partner. And if you want to testify that there was a –

THE WITNESS: I'll be happy to, Your Honor.

JUDGE PAINTER: – 15 or 20 percent net on it, that's fine with me, but just say it.

THE WITNESS: Okay.

JUDGE PAINTER: Then Mr. Traeger may decide to go into this further and it may – you better be sure your testimony is correct.

THE WITNESS: Right. Okay.

To give you an example in 1990, which is the return of '91, M and B lost a hundred and fourteen thousand and – a hundred –

(Respondent and his counsel confer off the record.)

THE WITNESS: Eleven thousand four –

JUDGE PAINTER: Just let's clarify one thing. I'm puzzled by your – you said that 1990 which was the –

[50] THE WITNESS: Okay. The 1990 – last year was '95, correct?

JUDGE PAINTER: What number does it say on the face of the return?

THE WITNESS: '91 return.

JUDGE PAINTER: And you filed that in '92, didn't you?

THE WITNESS: No, '91. Oh.

JUDGE PAINTER: You filed it in '92?

THE WITNESS: That is correct, sir. I'm sorry. That is correct.

JUDGE PAINTER: So that is the '91 income that you're looking at?

THE WITNESS: Right. That is correct.

In '91 we lost $11,425 after paying all expenses and everything else.

In '92, which would be '93, we lost twenty-one seven – a thousand –

JUDGE PAINTER: Again, in '92 would be '93. That is not –

THE WITNESS: No. It would be '91. Excuse me.

JUDGE PAINTER: Correct.

THE WITNESS: We lost –

JUDGE PAINTER: If it says '92 on that form –

THE WITNESS: Right.

[51] JUDGE PAINTER: – it's a '92 return.

THE WITNESS: Return, right. We lost $21,754.

In 1993 return we made $91,990. On that I would have received half of it.

In 1994 we made a $128,999, of which I would have received approximately 65,000, half of it.

All the costs and everything are all in here to verify those figures. And the –

JUDGE PAINTER: Anything else?

MR. THOMPSON: Yes.

BY MR. THOMPSON:

Q. Now you've testified earlier that you no longer are an owner of M and B or a or co-owner of M and B Trading?

A. That is correct.

Q. And you have a document –

A. Yes, I do.

Q. – that reflects that.

May I have the document marked?

JUDGE PAINTER: You've seen these documents, Mr. Traeger?

MR. THOMPSON: I'd like the document marked as Respondent's Exhibit Number 2. And it's a document that appears to have the signatures of Allen S. Bader and Howard Miller and two witnesses' signatures that I can't make out the name.

* * *

[53] A. Starting the date of that document, I am to receive three thousand dollars a month, minus five thousand dollars that I had to borrow to pay Robert Thompson, which I have to pay back to Mr. Bader.

(Respondent and his counsel confer off the record.)

BY MR. THOMPSON:

Q. You have also testified regarding a document that appears to be a list of banks and amounts owed to those banks?

A. Yes, it is –

Q. Did –

A. – that I borrowed to live on. It has all the account numbers and everything required to doublecheck.

If you want to check some of the cards, I have a couple here.

MR. THOMPSON: Your Honor, if I may have this marked as Respondent's 3?

JUDGE PAINTER: R-3. No objection, Mr. Traeger?

MR. TRAEGER: No objection.

JUDGE PAINTER: R-3 is admitted.

(Respondent Exhibit No. 3 was marked for identification and received in evidence.)

* * *

UNITED STATES OF AMERICA
BEFORE THE
COMMODITY FUTURES TRADING COMMISSION

| | | |
|---|---|---|
| In the Matter of | : | |
| HOWARD MILLER | : | CFTC Docket No. 92-4 |
| Respondent. | : | |

Friday, January 26, 1996

U.S. Bankruptcy Court
Courtroom 1539
225 East Temple Street
Los Angeles, CA 90012

The HEARING in the above-entitled matter commenced pursuant to notice, at 9:00 a.m.

BEFORE: GEORGE PAINTER
Administrative Law Judge
Office of Proceedings
Commodity Futures Trading Commission
2000 L Street, N.W., Suite 620
Washington, DC 20036

* * *

[77] PROCEEDINGS

(9:00 a.m.)

JUDGE PAINTER: All right. On the record.

MR. TRAEGER: Good morning, Your Honor. It's my understanding that Mr. Thompson has some witnesses this morning, and I have no objection if he takes them out of order at this point in time.

JUDGE PAINTER: Mr. Thompson?

MR. THOMPSON: Yes. Thank you, Your Honor. I would like to call Mr. Bob Kloss.

JUDGE PAINTER: Mr. Kloss, would you come forward, and would you raise your right hand, sir.

Whereupon,

ROBERT KLOSS

was called as a witness, and after having been first duly sworn, was examined and testified upon his oath as follows:

JUDGE PAINTER: Be seated.

Mr. Thompson.

MR. THOMPSON: Yes, thank you.

DIRECT EXAMINATION

BY MR. THOMPSON:

Q. Mr. Kloss, can you inform the Court of your full name and your address?

A. Robert Kloss, K-l-o-s-s. My business address is 343 Clark Street, Pomona 91767.

[78] Q. And what is your occupation, sir?

A. I'm a machinist, toolmaker, and I own a shop.

Q. And do you know the gentleman sitting next to me to my right, Mr. Miller?

A. Yes, I do.

Q. And how do you know him?

A. I deal with him. I have a little money in commodities, and he is my broker.

Q. And when did you start working – or working with Mr. Miller on your commodity account?

A. About a year ago, roughly.

Q. And have you had any problems in your account? And by "problems," I mean do you think that there have been any misrepresentations made to you about your account?

A. No, sir.

Q. Did you understand the risk involved or were the risks explained to you by Mr. Miller prior to you investing in commodity options?

A. I knew the risk beforehand, and he explained it to me in more detail when I met with him.

Q. Did Mr. Miller try to pressure you at any time into making a transaction in your account?

A. No, sir.

Q. Did Mr. Miller tell you anything about customers of his losing money?

[79] A. Yes. He said that some customers lost money, depending upon how the market went and how they purchased their commodities.

Q. Okay. Did he tell you anything about customers making money?

A. Yes, he did. He said if the market goes for you it your direction then you stand a chance of making some decent money.

Q. Did Mr. Miller indicate to you how many customers would lose in commodity options as opposed to win?

A. No.

Q. Do you recall speaking to any person that was taping your conversation?

A. Yes, he said that – we agreed on a – on a transaction, and he said for the records he'll be taping it.

Q. And did they do that?

A. Yes, they did.

Q. Okay.

A. Usually it was different broker come on. And he introduced himself on the phone and said: I will be taping it.

And I said "Fine," and we did.

Q. Okay. Was there anything that was said to you by this different person that was doing the taping that was different or that contradicted what Mr. Miller had told you [80] before?

A. No, sir. It was all virtually word for word what we had talked about.

Q. Did Mr. Miller ever at any time guarantee you that you would make a profit on your investment?

A. No, sir.

Q. Did Mr. Miller ever tell you that you would triple your money by investing in any particular commodity option transaction?

A. No, sir.

Q. Did Mr. Miller ever tell you that you would double your money?

A. No, sir.

Q. Did Mr. Miller, to your knowledge, did Mr. Miller ever misrepresent any facts about what your investment was, what you were purchasing?

A. No, sir.

Q. Do you believe that at all times during your account with Mr. Miller that you were treated fairly by Mr. Miller?

A. As far as I was concerned, he treated me very fairly.

MR. THOMPSON: Okay. Thank you.

I have no more questions, Your Honor.

JUDGE PAINTER: I have one or two before the cross.

[81] You began trading with Mr. Miller in January '95?

THE WITNESS: January or February, yes.

JUDGE PAINTER: And when did you quit trading through Mr. Miller?

THE WITNESS: When he retired.

JUDGE PAINTER: And when was that?

THE WITNESS: I don't know. If my memory serves me right, either October or November of this past year.

JUDGE PAINTER: In October or November of 1995?

THE WITNESS: Yes.

JUDGE PAINTER: All right. No more questions. Mr. Traeger.

MR. TRAEGER: Thank you.

CROSS-EXAMINATION

BY MR. TRAEGER:

Q. Mr. Kloss, how did you come into contact with Mr. Miller?

A. I'd been looking around for – to get into the options in commodities and talked to a Mr. David Cooper at his office, and I was planning on going with Mr. Cooper. Mr. Cooper took ill, and he recommended a fellow trader there on – in his office, and said: I'd recommend Mr. Miller.

Q. Well, this was at –

A. So I went –

Q. Excuse me. Finish your answer, please.

[82] A. So I went with his recommendation.

Q. This was at Star Commodities?

A. Yes, it was.

Q. And how is it that you learned about Star Commodities?

A. I'm an old farmer at heart. I was born and raised on a farm in the Midwest, and commodities has always been a fantasy of mine to get into, so I just started looking through the papers and called them.

Q. Did you see an ad in the papers or was this in the phone book, or how did this come about?

A. Oh, I think it was in the newspapers. I see different things in there and different commodity brokers, so I called them.

Q. Was this in the financial newspapers, like the Investors Daily or Wall Street Journal, or was it in the L.A. Times or –

A. I believe it was in the L.A. Times, if I remember right.

Q. And so sometime in January or approximately January 1995 you came into contact with the Star Commodities people; is that correct?

A. Yes.

Q. And around that time then you were referred to Mr. Miller; is that correct?

[83] A. Correct.

Q. What did you tell Mr. Miller that your investment goals were?

A. I wanted to try and make a little money, a little extra money.

Q. Gambling?

A. Yes.

Q. Did Mr. Miller – you've indicated that Mr. Miller ceased handling your account sometime around October of '95; is that accurate?

A. If I remember correctly, I can't guarantee it, but somewhere in that neighborhood.

Q. Do you still have an account with Star?

A. Yes, I do.

Q. Who carries your account now?

A. Allen Bader.

Q. And you actively trade that account?

A. Yes, I do.

Q. During the period between January and October of '95, did Mr. Miller call you on a regular basis and talk to you about your account?

A. Once or twice a week, give me updates.

Q. But this was on like a regular basis throughout that trading period of time?

A. Oh, sometimes he'd call me once a week, sometimes [84] three times a week and maybe I wouldn't hear from him for two weeks.

Q. But you'd have –

A. I'd have contact with him.

Q. Regular contacts –

A. Yes.

Q. – where he would talk with you about your account or investment opportunities?

A. Yes.

Q. Does Mr. Baker [sic] do the same thing with you now?

A. Yes, he does.

MR. TRAEGER: I have no further questions.

JUDGE PAINTER: Any redirect?

MR. THOMPSON: Yes.

REDIRECT EXAMINATION

BY MR. THOMPSON:

Q. Just so the record's clear, are you certain what month it was that you stopped doing business with Mr. Miller, or the month that he retired?

A. No. I'm not – I'm not sure. I'd have to – I don't even know if I have it written down at the office.

Q. Okay. But it would be safe to say that it was before the end of the year?

A. Oh, yes.

Q. Okay.

[85] A. Oh, yes. I'm just going to guess here. A couple of months ago.

MR. THOMPSON: Okay, I have no more questions.

THE WITNESS: Maybe three months ago.

JUDGE PAINTER: But you were trading, after June 1995 you were trading with Mr. Miller as your broker?

THE WITNESS: After June?

JUDGE PAINTER: You said you started trading January, February 1995. Were you trading after mid-June 1995?

THE WITNESS: I think so.

JUDGE PAINTER: Well, maybe we could get a stipulation as to this matter at a later time, Mr. Thompson. You don't have any documents to show a date, do you?

THE WITNESS: Not with me, no.

JUDGE PAINTER: All right.

You're excused, sir. Thank you.

THE WITNESS: Thank you.

(Witness excused.)

JUDGE PAINTER: Any other witnesses, Mr. Thompson?

MR. THOMPSON: Not at this hour.

JUDGE PAINTER: Now, Mr. Traeger?

MR. TRAEGER: Yes.

JUDGE PAINTER: Anything you want in the record?

* * *

[96] identification.)

MR. TRAEGER: It appears to be another part of the 1991 return. And if you'll give me just a moment, I plan to go through it.

(Pause.)

MR. TRAEGER: I have no questions on that document. Okay. I have a document which appears to be a 1992 income tax return and worksheet and request that that be marked as Division 8.

(Division Exhibit No. 8 was marked for identification.)

JUDGE PAINTER: What year?

MR. TRAEGER: It is 1992, Judge.

And if I could borrow a paper clip from the reporter, I'm going to put these two documents together.

BY MR. TRAEGER:

Q. Now, Mr. Miller, I'm going to the beginning of the document for 1992. And on line 17 it shows total pensions and annuities, $309,670. Can you explain that, sir?

A. Yes. That was my wife's and mine before I cashed in a lot of mine.

Q. And this document for 1992 shows total wages and salaries of $27,409. Is that correct, sir?

A. If it's on the taxes, they are correct.

* * *

[104] JUDGE PAINTER: And it's been amended. And there's no objection to its admission into the record, Mr. Thompson?

MR. THOMPSON: No, there's no objection.

JUDGE PAINTER: Division Exhibit Number 11 is admitted.

(Division Exhibit No. 11 was marked for identification and received into evidence.)

MR. TRAEGER: I have no further questions, Your Honor.

JUDGE PAINTER: Any cross, Mr. Thompson?

MR. THOMPSON: Yes, just a few questions, Your Honor.

RECROSS EXAMINATION

BY MR. THOMPSON:

Q. Mr. Miller, yesterday you were questioned about a pending settlement with the Siegel Company?

A. Correct.

Q. You are due to receive money from that settlement?

A. Yes, I am, sir.

Q. What are your plans for that money?

A. Well, number one, the attorneys that represented me have taken out their fee.

Number two, the hospitalization, when I had the [105] stroke, have taken out money from there also.

Number three, the money I have, I haven't paid my attorney, Mr. Robert Thompson, for over a year, quite a bit of money. I still owe him from the inception of this. So I'm paying his final fees.

And the remainder of the money I offered as a settlement to the CFTC, as I have no other money available, none. I just want this thing over with.

Q. Yesterday, Mr. Miller, we had marked as Exhibit – Respondent's Exhibit Number 3 a list of banks.

A. That is – no, they're credit cards and banks.

Q. Credit cards and banks.

A. Correct.

Q. What does that show us?

A. That shows you how much money I owe on each credit card that I borrowed to live on. It shows you what my home loan is – not – my wife's home loan, I should say, or children's. No longer mine.

And it also shows you that I'm in debt for over $90,000 of my own money to live on over the last few years.

Q. What are your plans for the settlement moneys if the settlement is – I mean, the settlement money that you're receiving from Siegel Trading Company. What are your plans for the settlement money should the Division not accept?

A. I'm going to use it for attorney's fees to [106] continue.

Q. But either way, it is my understanding this isn't money that you're going to be able to pocket?

A. No, I cannot profit from it. I can't even live on it. It's going to be given –

Q. Do you have any source by which to pay a penalty assessed against you in this case?

A. Outside of the money that I'm receiving from Siegel, I have no other moneys.

Q. Was there anything that prompted a settlement of that particular case?

A. Pardon me?

Q. Was there anything that prompted a settlement of that particular case?

A. Yes, there was. My attorney said I could keep fighting it and possibly get a lot more from Siegel, but I felt that I wanted to settle this, and I would take the cash available and just settle this and get it out of my life.

JUDGE PAINTER: Is that about it, Mr. Thompson?

MR. THOMPSON: Yes, that is, Your Honor.

JUDGE PAINTER: All right. What is your age, Mr. Miller?

THE WITNESS: Sixty-seven.

JUDGE PAINTER: And you're not employed at this time?

[107] THE WITNESS: No, I am not, sir.

JUDGE PAINTER: You have no – do you own any interest in any –

THE WITNESS: Nothing.

JUDGE PAINTER: – any entity that does business in the futures' area?

THE WITNESS: None whatsoever, sir.

JUDGE PAINTER: No, no interest in M and B?

THE WITNESS: None any longer. I –

JUDGE PAINTER: All right. You have no –

MR. TRAEGER: I think I've asked everything I could ask, Your Honor.

JUDGE PAINTER: Then you're excused, Mr. Miller.

THE WITNESS: Thank you.

Do you want these or –

MR. TRAEGER: We're going to copy those, Mr. Miller, and somehow we will get them back to you.

JUDGE PAINTER: Leave them right there, Mr. Miller.

THE WITNESS: Okay. Thank you.

(Witness excused.)

JUDGE PAINTER: Now, Mr. Traeger, anything else for your case in chief?

MR. TRAEGER: No further evidence to be presented, Your Honor.

JUDGE PAINTER: Mr. Thompson?

* * *

[109] [Provines Testimony] JUDGE PAINTER: One of the problems we have with that, you see, you'd have a better chance of getting this in if it were not under oath. If it's an affidavit, it's out. If it's simply a statement and both sides say, look, this is what he would say if he were here, we can cope with that.

MR. THOMPSON: That's why Mr. Provines is by the phone, so that he could satisfy the Court that he in fact filled this out and signed it.

JUDGE PAINTER: Well, that was thoughtful of him to do so, but it doesn't help. If you want to talk with Mr. Traeger –

MR. THOMPSON: Certainly.

JUDGE PAINTER: Do you want to get a stipulation, Mr. Traeger, that if this person appeared, they would testify as follows?

Off the record while you look at the document.

MR. TRAEGER: Thank you.

(Discussion off the record.)

JUDGE PAINTER: Now we're on the record. Mr. Thompson –

MR. THOMPSON: Yes.

JUDGE PAINTER: – you're going to represent what –

MR. THOMPSON: Yes. I'm representing that on the [110] questionnaire that was provided and signed by Mr. John T. Provines – P-r-o-v-i-n-e-s – he indicated that he was a customer of Mr. Howard Miller during times when Mr. Miller was at Siegel, as well as while Mr. Miller was at Star, and that he had no problem with him. He thought that Mr. Miller dealt with him fairly, that he was apprised of all the risks. There were no guarantees; there were no representations about doubling or tripling money.

In fact, he even says that, of course, if that were to happen he would have been long gone.

JUDGE PAINTER: All right. And he closed his account out and didn't sue Mr. Miller and has no ill feeling toward him, right?

MR. THOMPSON: Well, his account may still be open.

JUDGE PAINTER: Okay. May still be.

MR. THOMPSON: But he certainly has no problem with Mr. Miller. He didn't sue him, not planning to and he thinks he was a great broker.

JUDGE PAINTER: And you would suppose, Mr. Traeger, that if this person were to come in and testify, that's the testimony he would give?

MR. TRAEGER: I would think that that is a sum and substance and opinion of what would be testified.

JUDGE PAINTER: All right.

MR. TRAEGER: I would so stipulate that that person [111] would do that.

* * *